U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

July 21, 2010

MS. JENNIFER PEEBLES
#221
945 MCKINNEY STREET
HOUSTON, TX 77002

Subject: BARON, FREDERICK MARTIN

FOIPA No. 1147703- 000

Dear Ms. Peebles:

The enclosed documents were reviewed under the Freedom of Information/Privacy Acts (FOIPA), Title 5, United States Code, Section 552/552a. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Form OPCA-16a:

Section 552		Section 552a
☐(b)(1)	☐(b)(7)(A)	☐(d)(5)
☐(b)(2)	☐(b)(7)(B)	☐(j)(2)
☒(b)(3) Federal Rules of Criminal	☒(b)(7)(C)	☐(k)(1)
Procedure, Rule 6 (e)	☒(b)(7)(D)	☐(k)(2)
	☐(b)(7)(E)	☐(k)(3)
	☐(b)(7)(F)	☐(k)(4)
☐(b)(4)	☐(b)(8)	☐(k)(5)
☐(b)(5)	☐(b)(9)	☐(k)(6)
☒(b)(6)		☐(k)(7)

88 page(s) were reviewed and **84** page(s) are being released.

☐ Document(s) were located which originated with, or contained information concerning other Government agency(ies) [OGA]. This information has been:

- ☐ referred to the OGA for review and direct response to you.
- ☐ referred to the OGA for consultation. The FBI will correspond with you regarding this information when the consultation is finished.

☒ You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office of Information Policy, U.S. Department of Justice,1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Number assigned to your request so that it may be easily identified.

☐ The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown, when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

☒ See additional information which follows.

Sincerely yours,

David M. Hardy
Section Chief
Record/Information
Dissemination Section
Records Management Division

Enclosures (2)

No records responsive to your FOIPA request were located by a search of the electronic surveillance Indices maintained at Federal Bureau of Investigation.

EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

(b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to sueh Executive order;

(b)(2) related solely to the internal personnel rules and practices of an agency;

(b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that sueh statute(A) requires that the matters be withheld from the public in such a manner as to leave no diseretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(h)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could be reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could be reasonably expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

(d)(5) information compiled in reasonable anticipation of a civil action proceeding;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;

(k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;

(k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;

(k)(4) required by statute to be maintained and used solely as statistical records;

(k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;

(k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FBI/DOJ

FEDERAL BUREAU OF INVESTIGATION
FOIPA
DELETED PAGE INFORMATION SHEET

Serial Description ~ COVER SHEET

Total Deleted Page(s) ~ 2
Page 18 ~ b3, b6, b7C
Page 23 ~ b6, b7C

XXXXXXXXXXXXXXXXXXXXXXXX
X Deleted Page(s) X
X No Duplication Fee X
X for this Page X
XXXXXXXXXXXXXXXXXXXXXXXX

FEDERAL BUREAU OF INVESTIGATION
FOIPA
DELETED PAGE INFORMATION SHEET

Serial Description ~ COVER SHEET

Total Deleted Page(s) ~ 1
Page 3 ~ Duplicate

XXXXXXXXXXXXXXXXXXXXXXXX
X Deleted Page(s) X
X No Duplication Fee X
X for this Page X
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FEDERAL BUREAU OF INVESTIGATION
FOIPA
DELETED PAGE INFORMATION SHEET

Serial Description ~ COVER SHEET

Total Deleted Page(s) ~ 1
Page 3 ~ Duplicate

XXXXXXXXXXXXXXXXXXXXXXX
X Deleted Page(s) X
X No Duplication Fee X
X for this Page X
XXXXXXXXXXXXXXXXXXXXXXX

b6
b7C

1A Envelope

Case ID: 49A-DL-74944

DL	1	ORIGINAL NOTES RE INTERVIEW OF [redacted]
DL	2	ORIGINAL NOTES RE INTERVIEW OF [redacted] RE MEDIA CONTACT BY [redacted]
DL	3	MISC DOCUMENTS PROVIDED BY [redacted]
DL	4	PHOTOCOPIES OF VARIOUS CLIENT FILE DOCUMENTS AND INTERNAL MEMORANDUM
DL	5	HANDWRITTEN NOTE
DL	6	NOTES RE MEETING WITH [redacted] AND [redacted]
DL	7	BARON AND BUDD YEARBOOKS 97 AND 98
DL	8	RE [redacted]
DL	9	DOCUMENTS FROM [redacted]
DL	10	RE [redacted] VS BARON AND BUDD TRAVIS COUNTY
DL	11	PHOTOCOPY OF [redacted] AFFIDAVIT FILED IN BEXAR COUNTY
DL	12	PHOTOOPY OF LETTER TO ARRORNEYS FOR [redacted] FROM BARON AND BUDD
DL	13	ORIGINAL NOTES RE [redacted]

b6
b7C

1A Envelope

Case ID: 49A-DL-74944

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DL	8	RE [redacted]
DL	9	DOCUMENTS FROM [redacted]
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DL	11	PHOTOCOPY OF [redacted] AFFIDAVIT FILED IN BEXAR COUNTY
DL	12	PHOTOOPY OF LETTER TO ARRORNEYS FOR [redacted] FROM BARON AND BUDD
DL	~~13~~	~~ORIGINAL NOTES [redacted] (PROTECT IDENTITY)~~ Defeted

(06/01/1995)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 02/05/1996

To: Dallas

From: SA [redacted]
WCC1
Contact: SA [redacted]

Approved By: [redacted]

Drafted By: [redacted] kac

b6
b7C

Case ID #: 49A-DL-NEW (Pending)

Title: FREDERICK M. BARON;
[redacted]
BARON & BUDD;
BANKRUPTCY FRAUD
OO: DALLAS

Synopsis: Request opening and assignment of new 49A matter.

Details: On January 31, 1996, SA [redacted] met with [redacted] regarding the captioned matter. [redacted] a former employee of the law firm Baron & Budd, represented that she had documents and infomation which would support the allegation that Baron & Budd knowingly submitted false claims to several bankruptcy trusts on behalf of clients.

As detailed in the FD-302 which resulted from her interview, [redacted] maintains that Baron & Budd omitted information regarding medical history and/or cause of death to the Trustees administering trusts set up for the purpose of paying claims related to asbestos exposure. [redacted] alledges that Baron & Budd would withhold copies of the death certificate if the the cause of death was not asbestos related. [redacted] further alledges that in an effort to circumvent the statute of limitations which would begin to toll upon diagnosis of the asbestos related illness, Baron & Budd would instruct clients to lie to defense council and would send them to previously unseen physicians for a "initial" diagnosis.

b6
b7C

GRAND JURY MATERIAL - DISSEMINATE ONLY PURSUANT TO RULE 6(e) FED.R.CRIM.P.

49A-DL-74944-1

SEARCHED — INDEXED —
SERIALIZED — FILED —
FEB 06 1996
DALLAS

SENT DATE 2/6/96

2/5/96

K - 0/A to [redacted]

036KAC.EC

(06/01/1995)

FEDERAL BUREAU OF INVESTIGATION

To: SAC, DALLAS From: SA [redacted]
Re: 49A-DL-NEW, 02/05/1996

Baron & Budd are purported to be one of the largest large firms dealing with asbestos related claims in the country. If the allegations made by [redacted] are proven, the possible fraud perpetrated in the matter would be several million dollars. b3 b6 b7C

Assistant United States Attorney (AUSA) [redacted] has been assigned to this matter, and has given a preliminary opinion requesting additional investigation. To date [redacted]

GRAND JURY MATERIAL - DISSEMINATE ONLY PURSUANT TO RULE 6(e) FED.R.CRIM.P.

Inventory of Bulky Nonevidentiary Property
FD-192a (Rev. 2-12-02)

Date: May 27, 2003

Title and Character of Case
Baron & Budd's et al Bankruptcy Fraud

File No.: 49A-DL-74944

OO: Dallas

Date Acquired	Acquired From:	See Serial	Acquiring Agent	Case Agent
7-16-98	[redacted], Dallas County DA		[redacted]	[redacted]

To Be Returned ☐ Yes ☑ No

☐ Yes ☑ No Grand Jury Material - Disseminate Only Pursuant to Rule 6(e), Federal Rules of Criminal Procedure

b6
b7C

☐ Yes ☑ No Property To Be Forfeited To The U.S. Government

Description of Property (Be Specific)

4 Boxes containing misc records belonging to [redacted], former attorney at Baron + Budd

49A-DL-74944-1C1

For Administrative Use:

Location of Property: _____

Control Number: _____

BLOCKSTAMP

Inventory of Bulky Nonevidentiary Property
FD-192a (Rev. 2-12-02)

Date May 27, 2003

Title and Character of Case
Baron and Budd; et al
Bankruptcy Fraud;

File No.: 49A-DL-74944

oo: Dallas

Date Acquired	Acquired From:		
To Be Returned ☐ Yes ☑ No	See Serial	Acquiring Agent	Case Agent

☐ Yes ☑ No Grand Jury Material - Disseminate Only Pursuant to Rule 6(e), Federal Rules of Criminal Procedure

b6
b7C

☐ Yes ☑ No Property To Be Forfeited To The U.S. Government

Description of Property (Be Specific)

Three (3) red well folders containing copies of documents collected by [redacted] and the Dallas County Grand Jury (No 6E) regarding the investigation of Baron & Budd

49A-DL-74944-CO

For Administrative Use:

Location of Property: _____

Control Number: _____

BLOCKSTAMP

Automated Serial Permanent Charge-Out
FD-5a (1-5-94)

Date: 08/03/98 Time: 16:06

Case ID: 49A-DL-74944 Serial: 2

Description of Document:

Type : SUBPOENA
Date : 02/01/96
To : DALLAS
From : DALLAS
Topic: [redacted]

b6
b7C

Reason for Permanent Charge-Out:

TRANSFER TO NEW SUBFILE

Transferred to:

Case ID: 49A-DL-74944-SBP Serial: 2

Employee: [redacted]

FD-302 (Rev. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Data of transcription 2-8-96

[redacted] was interviewed in the offices of the FEDERAL BUREAU OF INVESTIGATION (FBI), Dallas Division, Dallas, Texas. At the onset of the interview, Special Agent (SA) [redacted] advised [redacted] to present her allegation only in general terms in light of a Temporary Restraining Order precluding her from discussing issues pertaining to her former employer, BARON & BUDD. Having been advised of the identity of interviewing agent and the purpose of the interview, [redacted] provided the following information: b6 b7C

[redacted] is currently employed as a [redacted] works for her [redacted] has a high school education, having graduated from [redacted] Texas.

[redacted] sometimes stays with her [redacted]

[redacted] is currently being represented in this matter by [redacted] recommended that [redacted] contact the FBI and the United States Attorney with her allegations. b6 b7C

[redacted] explained that she had previously worked for the law firm of BARON & BUDD, whose practice was principally involved in asbestos litigation. [redacted] alleges that BARON & BUDD knowingly submitted fraudulent claims to the trusts set up to pay claims relating to asbestos related illnesses or deaths.

According to [redacted] each trust requires certain documentation setting forth that the disease or death is asbestos related. Often the trust will have its own forms that need to be submitted with the claims. [redacted] advised that BARON & BUDD would withhold the death certificate from the trust or photocopy the death certificate in such a way as to conceal the cause of death if the certificate reflected a cause of death that was not

039KHC01.302

Investigation on 1-31-96 at Dallas, Texas File # 49A-DL-74994-3

by SA [redacted] /kac Date dictated 2-5-96 b6 b7C

indicative of asbestos exposure. [redacted] added that BARON & BUDD had internal memoranda which was attached to the death certificates in the client file that instructed employees not to send the death certificate to the trust.

[redacted] also explained that BARON & BUDD would circumvent the statute of limitations. According to [redacted] the statute runs either one, two, or three years from the date of diagnosis depending on the state. [redacted] stated that on occasions where the statute of limitations had expired, BARON & BUDD would send the client to a new doctor for an "initial" diagnosis, and would instruct their client to lie to the defense counsel as to when the illness was first diagnosed. b6 b7C

[redacted] advised that in one situation one of the partner's wives, who was on the support staff at the firm, had prepared a letter which was inadvertently sent to the defense counsel instructing a client to lie in deposition.

[redacted] explained that the firm has various physicians, which they refer to as "whore doctors" who will testify as experts representing that a particular disease is related to asbestos exposure.

[redacted]

[redacted] advised that she has heard that [redacted] is currently under investigation by a Federal Grand Jury.

b6 b7C

[redacted]

[redacted] stated that on one occasion a co-worker asked [redacted] The question was overheard by [redacted] who told the co-worker, [redacted] also stated that when the employees in her department received their yearly bonuses, they were each called into [redacted]' office. [redacted] On the following day, [redacted]

b6
b7C

The interviewing agent explained to [redacted] that the FBI and the United States Attorney's Office would not involve themselves in her civil litigation, however would review her allegations and conduct an investigation if appropriate. [redacted] agreed to cooperate fully.

At the conclusion of the interview [redacted] provided the following documents to the interviewing agent:

[redacted]

b3
b6
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FD-302 (Rev. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 2-8-96

[redacted] was served with a Federal Grand Jury Subpoena issued by the Northern District of Texas on February 1, 1996.

Pursuant to the aforementioned subpoena, [redacted] produced the following documents to Special Agent (SA) [redacted]

[redacted]

b3
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b6
b7C

034KACO2.302

Investigation on 2-1-96 at Dallas, Texas File # 49A-DL-74994

by SA [redacted] /kac Date dictated 2-5-96

(06/01/1995)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 02/07/1996

To: Dallas

From: SA [redacted]
WCC1
Contact: SA [redacted]

Approved By: [redacted]

Drafted By: [redacted]:kac

b6
b7C

Case ID #: 49A-DL-74994 (Pending)

Title: FREDERICK M. BARON;
[redacted]
BARON & BUDD;
BANKRUPTCY FRAUD

Synopsis: Re possible media interest in captioned matter.

Details: On February 7, 1996, SA [redacted] was contacted by [redacted], the attorney representing [redacted], in the captioned matter. [redacted] advised that prior to speaking with the FBI regarding allegations of fraud, [redacted] had made contact with three reporters from the Dallas Morning News: [redacted], and [redacted]. [redacted] advised that [redacted] was present at a court hearing on February 6, 1996, where the Court was notified of the Federal Grand Jury investigation of this matter.

During a subsequent conference call with SA [redacted], [redacted], and [redacted], SA [redacted] requested that [redacted] make no further comment to the media, and/or any other parties or individuals regarding this matter. [redacted] agreed to abide by SA [redacted]'s request.

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SA [redacted] has advised Media Representative, [redacted], and Assistant United States Attorney [redacted] of possible media inquiries regarding this matter.

SENT
DATE 2/16/96

49A-DL-74994-5

SEARCHED INDEXED
SERIALIZED FILED
FEB 13 1996
FBI—DALLAS

0591KL03.EC

(06/01/1995)

FEDERAL BUREAU OF INVESTIGATION

To: SAC, DALLAS From: SA [redacted]
Re: 49A-DL-74994, 02/07/1996

For information of SSA [redacted] based on the nature of the allegations in this matter, and the possible dollars figures involved, it is very likely that as this investigation expands feathers will be ruffled and the media will be watching. It is requested that SSA [redacted] advise SA [redacted] if a communication should be sent to FBIHQ regarding this matter.

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♦♦

(06/01/1995)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 05/28/1996

To: Dallas

From: SA [redacted]
WCC1

b6
b7C

Approved By: [redacted]

Drafted By: [redacted] :rv

Case ID #:
29B-DL-71925 (Pending)
29A-DL-7956 (Pending)
29B-DL-61765 (Pending)
29B-DL-6329 (Pending)
29B-DL-63493 (Pending)
29B-DL-64406 (Pending)
29B-DL-70446 (Pending)
29B-DL-70979 (Pending)
29B-DL-72058 (Pending)
29B-DL-72895 (Pending)
29B-DL-73346 (Pending)
29B-DL-75332 (Pending)
29B-DL-7744 (Pending)
29C-DL-6313 (Pending)
29C-DL-68514 (Pending)
29C-DL-72059 (Pending)
29C-DL-72939 (Pending)
29C-DL-72948 (Pending)
29H-DL-55102 (Pending)
29K-DL-68241 (Pending)
29K-DL-71924 (Pending)
49A-DL-74944 (Pending)
29B-DL-75632 (Pending)
29B-DL-75853 (Pending)

Title: File Review

Synopsis: Re investigative status of captioned cases.

Details: During the majority of the last two file review periods, SA [redacted] has been involved in trial preparation and subsequent trial for 29B-DL-71925.

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SA [redacted] is currently in the process of reviewing files in an effort to establish current investigative priorities, update prosecutive opinions, and close cases if appropriate. It

49A-DL-74944 - 7

SEARCHED [redacted] INDEXED [redacted]
SERIALIZED [redacted] FILED [redacted]
MAY 30 1996
FBI—DALLAS

file filled up
151R101.EC No Doc

is SA [redacted]s goal to have all cases current within the next ninety days. SA [redacted] is currently set for trial in 29B-DL-70446 on August 5, 1996. Plea negotiations are ongoing, however, at present there is every indication that the matter will proceed to trial as scheduled.

♦♦

ALERT ALERT ALERT ALERT ALERT ALERT ALERT ALERT ALERT

TO: ALL MEMBER BANKS

DATE: 6-12-97

FROM: Dallas Co. D.A.

TIME: 10:30 Am

SUBJECT: Account Search

MSG. #: DAL 97-057

PREPARED BY: [redacted]

FAX PHONE #: [redacted]

b6
b7C

The Dallas District Attorney has reason to believe that bank accounts, including safe deposit boxes, may exist in the Dallas area in the names listed below.

NAME [redacted]

[redacted]

CUA 296-DL-58022-X CUA 296-DL-58022-B CUA [redacted]

P. 1

b6
b7C

These records are necessary for a criminal investigation being conducted by The Dallas District Attorney.

If your bank has any accounts for listed subjects, we would appreciate you notifying [redacted] at [redacted] and providing that information to them for their investigation.

49A-DL-74944-8

~~29-100~~

SEARCHED [initials] INDEXED [initials]
SERIALIZED [initials] FILED [initials]
JUL 23 1997
[redacted] AS

Automated Serial Permanent Charge-Out
FD-5a (1-5-94)

Date: 08/03/98 Time: 16:21

Case ID: 49A-DL-74944 Serial: 9

Description of Document:

Type : NEWSPAPE
Date : 09/28/97
To : DALLAS
From : DALLAS
Topic: DALLAS MORNING NEWS-LAW FIRM'S MEMO IN ABESTOS LAWSUIT

Reason for Permanent Charge-Out:

TRANFERRED TO NEW SUBFILE

Transferred to:

Case ID: 49A-DL-74944-NC Serial: 2

Employee: [redacted] b6 b7C

49A-DL-74944-9

Automated Serial Permanent Charge-Out
FD-5a (1-5-94)

Date: 08/03/98 Time: 16:25

Case ID: 49A-DL-74944 Serial: 10

Description of Document:

Type : NEWSPAPE
Date : 10/04/97
To : DALLAS
From : DALLAS
Topic: DALLAS MORNING NEWS/JUDGE'S HALT OF ASBESTOS CASES INVOLVING

Reason for Permanent Charge-Out:

TRANSFERRED TO NEW SUBFILE

Transferred to:

Case ID: 49A-DL-74944-NC Serial: 3

Employee: [redacted]

b6
b7C

49A-DL-74944-10

Automated Serial Permanent Charge-Out
FD-5a (1-5-94)

Date: 08/03/98 Time: 16:28

Case ID: 49A-DL-74944 Serial: 11

Description of Document:

Type : OTHER
Date : 02/14/98
To : DALLAS
From : DALLAS
Topic: PRINT OUT FROM DALLAS MORING NEWS/STATE JUDGE WITHDRAWS FROM

Reason for Permanent Charge-Out:

TRansferred to new subfile

Transferred to:

Case ID: 49A-DL-74944-NC Serial: 4

Employee: [redacted] b6 b7C

49A-DL-74944-11

(06/01/1995)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 07/20/1998

To: Dallas

From: SA [redacted]
WCC1
Contact: [redacted]

b6
b7C

Approved By: [redacted]

Drafted By: [redacted] rv

Case ID #: 49A-DL-74944 (Pending)
49A-DL-74944 SUB NC
49A-DL-74944 SUB SBP

Title: BARON AND BUDD;
ET AL;
BANKRUPTCY FRAUD
OO: DALLAS

Synopsis: Open and assign sub files for captioned investigation.

Details: As the captioned investigation expands, it is anticipated that the administrative management of the documentation associated with the investigation will become burdensome. In an effort to facilitate the organization of records, various sub files will be opened as required.

It is requested that two sub files be opened at this time: Sub NC for newspaper clippings and print media, and Sub SBP for subpoenas.

b6
b7C

WCC1 [redacted]
Open subfiles 1
N + SBP for assignment
to SA [redacted]
K/ak
7/28/98

49A-DL-74944-12
K/ak

288RV03.EC ✓

Automated Serial Permanent Charge-Out
FD-5a (1-5-94)

Date: 08/12/98 Time: 11:54

Case ID: 49A-DL-74944 Serial: 13

Description of Document:

Type : LETTER
Date : 07/20/98
To : DALLAS
From : DOJ/
Topic: RE: [redacted]

b6
b7C

Reason for Permanent Charge-Out:

MADE IN ERROR

Employee: [redacted]

49A-DL-74944-13

(06/01/1995)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 08/03/1998

To: Dallas

From: SA [redacted] b6 b7C
WCC1
Contact: [redacted]

Approved By: [redacted]

Drafted By: [redacted] rv

Case ID #: 49A-DL-74944 (Pending)

Title: FREDERICK M. BARON;
ET AL;
BANKRUPTCY FRAUD
OO: DALLAS

Synopsis: Results of meeting with Raymark official, [redacted]

Details: On July 13, 1998, SA [redacted] met with [redacted] Raymark, a company that made asbestos products. Accompanying [redacted] was his lawyer, [redacted] and [redacted]'s lawyer, [redacted] The meeting occurred in the offices of the United States Attorney, Northern District of Texas.

[redacted] had requested the meeting to discuss with the FBI his concerns regarding the unfettered actions of the attorneys at Baron & Budd, specifically Fred Baron. [redacted] stated that he believes that Baron & Budd lawyers are knowingly engaging in fraud.

Both [redacted] and [redacted] were very passionate about their beliefs, stating that Baron believed that he was above the law. [redacted] stated that he was concerned that the FBI could be influenced by Baron's great wealth and power. [redacted] was assured by SA [redacted] that the FBI would not be influenced by Baron. b6 b7C

[redacted] suggested that the FBI pursue a review of cases where Baron & Budd has filed wrongful death suits. [redacted] believes that in many of these cases the cause of death was not asbestos related.

[redacted] equates Baron & Budd's litigation style to staged accident cases. [redacted] stated that if twenty people were riding on a bus that had been involved in an automobile accident, Baron

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& Budd would file lawsuits indicating that several hundred individuals had been injured on the bus.

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At the conclusion of the meeting, [redacted] provided SA [redacted] with a binder titled "Mass Tort Litigation Asbestos Plaintiff's Attorneys - Racketeering & Fraud". [redacted] stated that this information would detail Raymark's views on Baron & Budd.

(06/01/1995)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 08/03/1998

To: Dallas

From: SA [redacted]
WCC1
Contact: [redacted]

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Approved By: [redacted]

Drafted By: [redacted] :rv

Case ID #: 49A-DL-74944 (Pending)

Title: FREDERICK M. BARON;
ET AL;
BANKRUPTCY FRAUD
OO: DALLAS

Synopsis: Details regarding meeting with two former Baron & Budd clients.

Details: On July 28, 1998, SA [redacted] met with [redacted] and [redacted] both of whom were previous clients of Fred Baron. [redacted] individuals who believed that the had been "defrauded" by Baron when he represented them in a class action suit against a West Dallas lead smelter in the mid 1980's. [redacted] and [redacted] had been referred to the FBI by the Dallas County District Attorney's Office, specifically [redacted]

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The women advised that Baron had misrepresented the terms of the settlements, and that when they had asked questions, they had been provided with misleading answers. Baron had refused to provide copies of any documents, and the records had been sealed so they were unable to obtain them through public record requests. Subsequently, Baron simply quit returning their calls. The women had various complaints about unfulfilled promises made by Baron. The women further advised that Baron at one time was quoted in the newspaper referring to his lead clients as "unsophisticated." The women stated that they and their friends relied on Baron to advise them about various lead issues, none of which occurred.

The women went on to explain that for the past ten years, they have filed numerous grievances and complaints against Baron, and have attempted to retain attorneys to sue Baron for malpractice. The attorneys have always indicated that there had been malpractice, but refused to take on Baron. The women added that at the time, they filed their first grievances with the State Bar of Texas, Baron was President of the State Bar.

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The women advised that they contacted the FBI because they believed that Baron and his illegal practices needed to be stopped, and that they hoped that they could find someone who could help them. The women also expressed concern that Baron was so powerful he could influence the FBI.

After reviewing the documents that the women had provided, and discussing the issue in detail, SA [redacted] advised that the statute of limitations had run on any criminal conduct that Baron may have engaged in during the course of their case. b6 b7C

The women were advised that an investigation was being conducted regarding similar complaints, and that the FBI would conduct a thorough and impartial investigation, without influence from Baron.

At the conclusion of the meeting, the women stated that they were appreciative of the time that SA [redacted] had spent with them, and that they hoped that her investigation would finally stop Baron from hurting other unsuspecting clients.

The results of this meeting were brought to AUSA [redacted]'s attention.

(12/31/1995)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 09/01/1998

To: Dallas

From: SA [redacted]
WCC1
Contact: SA [redacted]

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Approved By: [redacted]

Drafted By: [redacted]

Case ID #: 49A-DL-74944 (Pending)

Title: FRED M. BARON;
et al;
Bankruptcy Fraud;
OO: Dallas

Synopsis: Re letter received by United States Attorney Paul Coggins regarding captioned subject, Fred M. Baron and the law firm of Baron & Budd.

Details: On August 25, 1998, SA [redacted] received a photocopy of a letter addressed to Paul Coggins, United States Attorney, Northern District of Texas, from [redacted] of Princeton Realty. The letter commented on an article printed in The Dallas Observer regarding Baron & Budd.

At the request of Assistant United States Attorney [redacted] SA [redacted] reviewed the letter, which is attached and made a part of this EC. AUSA [redacted] had noted that [redacted] had referred to copies of documents that he had in his possession regarding fraudulent conduct by Baron & Budd. [redacted] advised that he had obtained the documents from a former employee, who he described as having been involved in a law suit with Baron & Budd. AUSA [redacted] recommended contacting [redacted] to obtain the documents and interview him regarding his knowledge of the activities of Baron & Budd.

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After reviewing the letter, it is SA [redacted]'s opinion that [redacted] is referring to [redacted], who had previously met with SA [redacted] and provided both information and documents regarding Baron & Budd. Further, as the letter contained no information that was not previously known, and was confrontational as to the actions of the Government in the Baron & Budd investigation, SA [redacted] will not pursue an interview with [redacted] at this time.

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SA [redacted] discussed her concerns with AUSA [redacted] who concurred with her decision not to interview [redacted]

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PRINCETON REALTY

[redacted]

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Mr. Paul Coggins
U.S. Attorney Justice Department
100 Commerce Street, Third Floor
Dallas, Texas 75242

August 13, 1998

RE: Baron & Budd.

Dear Mr. Coggins,

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Approximately two years ago, a non profit organization I am [redacted] of was running some radio spots on KRLD discouraging lawsuit abuse . We received a strange phone call from a paralegal that worked at Baron & Budd that heard the ad. As you are aware Baron & Budd is one of the nation's largest asbestos claim firms. To make a long story short, the paralegal said she was involved in a employment related suit against the firm, and claimed she quit or was terminated because she refused to work or help fabricate testimony or evidence to support asbestos claims. The paralegal also said that Baron & Budd intentionally withheld evidence that did not support the firm's asbestos claims. At first the whole story sounded like a crazy tale from a disgruntled employee wanting to get rich , or something from "The Firm" and was discounted as such. Amazingly, the Baron employee's story has been validated by a number of sources in the enclosed August 13-19 1998 *Dallas Observer*.

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Later, the same paralegal produced, (and I have maintained with my attorney) , pages and pages of documents allegedly relating to false Baron and Budd claims. According to the paralegal, and supported by the documents she provided , Baron and Budd with held correct death certificates from the opposing counsel and misrepresented the real cause of death on claims. Baron and Budd allegedly hid their discovery abuse by instructing employees by memo to not send the correct death information, "...to the UNR Trust in light of the causes noted on the certificate".

She said death certificates were intentionally with held [redacted] on James Hill because they would not support the Baron & Budd claims. Baron & Budd reportedly told the court or defendant in writing on a Proof of Claim Form that Hill's death certificate was not available. Not only was the certificate available according to the paralegal, the certificate showed that death was not substantially related to asbestos as Baron & Budd submitted to the court or defendant, but caused by a blood clot to the brain. The paralegal told me that she told Mr. Baron about the forgoing and other problems at the firm, but that Baron ignored her accusations. The paralegal said the forgoing was a pattern of behavior at Baron and Budd. She stated Baron & Budd was a lawsuit factory where employees were compensated in great part, according to the amount of claims filed not according to the truthfulness of the claims, and that testimony was taught litigants.

The actual cause of Mr. Hills death, and the original death certificate is no doubt available in Detroit, and the claims made and pleadings are available from the Court. It should be easy to compare to verify if the paralegal is telling the truth. Clearly, either the paralegal, is provided misleading testimony to the Justice Department for the wrongful purpose of incriminating Baron and Budd and filed a false civil lawsuit, or Baron & Budd is filing false claims. To believe that the paralegal is lying would require

that she is a master forger of documents and death certificates and somehow was able to get others that worked at the firm to support her story to the *Dallas Observer* reporters.

The paralegal told me how the Baron and Budd experts were nicknamed "whore doc's" by Baron employees because they would provide any testimony the firm deemed necessary in their litigation. Alleged records of an audit reportedly performed by one trust found that four claims of the many audited involved fraudulent work histories. If true, *The Rules of Professional Conduct and Rules of Court* require even in hindsight, that Baron and Budd report the false claims to the tribunal. Have they made any report, or did they get richer from these four claims? This verification would involve only the most simple investigation.

Reportedly, Baron and Budd have filed over 20,000 asbestos lawsuits in Texas. Extrapolating the results from the alleged audit documents would mean almost a thousand lawsuits filed in Texas Courts may also involve fraudulent work histories and claims. Assuming a 40% fee based upon a $25,000 settlement, which is the low end, this would mean $10,000,000.00 was paid Baron & Budd on people that had **no** work history exposure to asbestos!! The paralegal told me the real number is much, much, higher, and that clients were solicited. I have no way of knowing to the extent this is true. I do know that Baron & Budd has become fabulously wealthy on asbestos claims.

During the civil lawsuit, I watched the Baron & Budd firm slowly and methodically break down the paralegal. I can see why even the biggest corporations fear them, or have been driven into bankruptcy. She told me she settled her civil claims in return for her silence and peace. I literally saw her lose some of her hair from stress. During the litigation she came to my office three or four times and cried as she tried to defend herself as Baron's

attorney [redacted] allegedly demanded she have mental examinations scheduled days at a mental hospital, and did other antics that seem incomprehensible. I watched on the sidelines wondering what the Justice Department was doing to either confirm or deny the documents it had that would validate the paralegal' s claims and lawsuit. Instead I saw her crushed. Now others are coming forward, and I expect more will continue.

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The paralegal told me she provided the same documents to the Justice Department about two long years ago. She said there was a female FBI agent assigned as well as a representative from the Justice Department- a Mr.[redacted] I believe this is true because she also gave me copies of documents from the Justice Department showing it's fax ID number and 9/6/1996 date showing her how to defends claims under the crime/fraud exception to attorney privilege. I also talked to her lawyer, who is now a District Judge [redacted] and he confirmed that he had referred her to the Justice Department and that he believed that it appeared a massive fraud was taking place based upon the documents. An official in the Justice Department has reportedly recently even told an officer of the court that they have good authority that Baron & Budd is destroying evidence. The officer of the Court said he would testify to that and I think can document this.

Either

1. all of the numerous sources for the *Dallas Observer* article, the paralegal, and many other witnesses with no prior relationship with each other, and no economic incentive, have somehow conspired together to create the most concocted false claim against a law firm in the history of the Northern District, (alleging a fraud of the size we haven't seen since the S& L crisis), or,

2. the Justice Department is dragging it's feet implicating a law firm because it lawyers are politically connected - all the way to the President.

This letter is a call to have the Justice Department either investigate and publicly **clear the name of Baron & Budd,** or confirm the story and take appropriate action to **clean up the legal profession**. The public's distrust of our legal system is at an all time low. The *Dallas Observer* article, and silence by our own Justice Department on it's accuracy , shows why. Doing nothing is not good public policy.

If the Justice Department allows lawyer's that have a vested interest in the outcome of a lawsuit to;

1. write their client's testimony,
2. tell their client's what they need say to win,
3. hide the truth,

there will be no justice system for you to enforce.

Cordially,

[redacted]

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enclosure: *Dallas Observer* August 13-19, 1998

(12/31/1995)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 08/25/1998

To: Dallas

From: SA [redacted] b6 b7C
WCC1
Contact: SA [redacted]

Approved By: [redacted]

Drafted By: [redacted]

Case ID #: 49A-DL-74944

Titls: FRED M. BARON;
et al;
Bankruptcy Fraud;
OO: Dallas

Synopsis: Annonymous telephone call received by the United States Attorney's Office.

Details: On August 14, 1998, a anonymous call was received by Assistant United States Attorney [redacted] regarding the captioned matter. AUSA [redacted] contacted SA [redacted] and provided the following information regarding the call.

AUSA [redacted] advised that the call was received at approximately 2:00 pm. The caller sounded [redacted] with what AUSA [redacted] described as a [redacted] AUSA [redacted] advised that he believed that the caller was using a pay phone as he (AUSA [redacted] could hear traffic noise in the background. b6 b7C

The caller advised AUSA [redacted] that he was a current employee of BARON and BUDD, and had a family and children to support, and did not want to lose his job. AUSA [redacted] stated that caller advised that he was not an attorney. The caller advised that he would only call once, and would not provide his name or any information which would allow any one working the case to contact him at a later time.

The caller stated that [redacted] "knew about the memo."

The caller stated that Baron and Budd clients were routinely told by the paralegals, "if you want money you have to "ID" the products." The caller stated that this related to administrative claims.

The caller stated that paralegals are forging hundred of affidavits at the direction of "the director."

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The caller stated that current employees and and former employee could provide information of value. now lives in and works for

AUSA advised that the caller again stated that the clients were advised "if you want the money, this is whose product you need to identify." b6 b7C

The caller also advised that Baron and Budd fraudulent claims were submitted to the bankrupt companies. Baron and Budd employee, had told paralegals to complete false claim documents.

The caller stated that former employees and could provide information regarding the false claims. works for the law firm of and is currently residing in

The caller stated that he believed that current employees and (phonetic) could also provide information of value.

The caller stated that left with Baron and Budd documents that would be very valuble, and knew all about the fraud. sued Baron and Budd and was represented by an attorney named The caller stated that Baron and Budd bought off to ensure her silence.

When AUSA again requested that the caller consider speaking with someone more familiar with the case the caller stated that he could not risk losing his job because "you can't live on snowcones." b6 b7C

AUSA stated that he had reported the call to his supervisor, AUSA who referred him to SA

For information of the file the call was placed following the publication of a newspaper article regarding wrongdoing on the part of Baron and Budd.

974 F.2d 246 printed in FULL format.

UNITED STATES OF AMERICA, Appellee, v. MORRIS J. EISEN, JOSEPH P. NAPOLI, HAROLD M. FISHMAN, DENNIS RELLA, MARTY GABE, GERALDINE G. MORGANTI, and ALAN WEINSTEIN, Defendants-Appellants, LEONARD KAGEL, Defendant.

Docket Nos. 91-1549(L), 91-1551, 91-1552, 91-1553, 91-1554, 91-1555, 91-1633, 92-1032

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

974 F.2d 246; 1992 U.S. App. LEXIS 19055

April 29, 1992, Argued

August 17, 1992, Decided

SUBSEQUENT HISTORY: As Amended August 26, 1992.

PRIOR HISTORY: [**1] Appeal from judgments of the United States District Court for the Eastern District of New York (Charles P. Sifton, Judge), convicting defendants of RICO violations, in violation of *18 U.S.C.* § *1962*(c), (d) (1988), arising out of a law firm's fraudulent conduct of personal injury cases.

DISPOSITION: Affirmed.

CORE TERMS: conspiracy, mail fraud, racketeering, predicate, bribery, guideline, personal injury, indictment, grand jury, cross-examination, fraudulent, prosecutor, perjury, investigator, leak, effective, testify falsely, invalid, summation, false testimony, deliberations, bribe, mailing, juror, sentencing, supermarket, secrecy, scheme to defraud, convicted, co-conspirator

COUNSEL: ALAN M. DERSHOWITZ, New York, N.Y. (Nathan Z. Dershowitz, Dershowitz & Eiger, New York, N.Y.), for defendant-appellant Eisen.

JOSEPH P. NAPOLI, pro se, New York, N.Y.

STEVEN R. KARTAGENER, New York, N.Y. (Roger L. Stavis, Kartagener & Stavis, New York, N.Y., on the brief), for defendant-appellant Fishman.

RICHARD MISCHEL, New York, N.Y., for defendants-appellants Rella and Morganti.

MARTIN J. SIEGEL, New York, N.Y., for defendant-appellant Gabe.

RONALD E. DEPETRIS, New York, N.Y. (Seth F. Kaufman, Carro, Spanbock, Kaster & Cuiffo, New York, N.Y., on the brief), for defendant-appellant Weinstein.

FAITH E. GAY, Asst. U.S. Atty., Brooklyn, N.Y. (Andrew J. Maloney, U.S. Atty., Susan Corkery, David C. James, Peter A. Norling, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), for appellee.

JUDGES: Before: MESKILL, Chief Judge, [**2] TIMBERS and NEWMAN, Circuit Judges.

OPINIONBY: JON O. NEWMAN

OPINION: [*250] JON O. NEWMAN, Circuit Judge:

This is an appeal of RICO convictions arising from a law firm's fraudulent conduct [*251] of civil litigation as plaintiff's counsel in personal injury cases. The appeal is brought by Morris J. Eisen, Joseph P. Napoli, Harold M. Fishman, Dennis Rella, Marty Gabe, Geraldine G. Morganti, and Alan Weinstein from judgments of the United States District Court for the Eastern District of New York (Charles P. Sifton, Judge), following a four-month jury trial. We affirm.

Background

Morris J. Eisen, P.C. ("the Eisen firm") was a large Manhattan law firm that specialized in bringing personal injury suits on behalf of plaintiffs. The defendants, seven of the Eisen firm'a attorneys, investigators, and office personnel, were tried jointly on two counts of conducting and conspiring to conduct the affairs of the Eisen firm through a pattern of racketeering activity, in violation of *18 U.S.C.* §§ *1962*(c), (d) (1988). The

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indictment alleged, as the underlying acts of racketeering, that each of the defendants committed, among other crimes, numerous acts of mail fraud, in violation of *18 U.S.C. § 1341*, and bribery of [**3] witnesses, in violation of New York Penal Law § 215.00 (McKinney 1988).

Eisen was the founder, sole shareholder, and principal attorney of the Eisen firm. Napoli was associated with the Eisen firm in an "of counsel" capacity, and he was the main trial attorney for the firm. Fishman, a trial attorney, was also "of counsel" to the firm. The Eisen firm regularly used investigators to assist attorneys in the trial preparation of personal injury cases, and defendants Weinstein, Gabe, and Rella were private investigators affiliated with the firm. Morganti was the office administrator of the Eisen firm with responsibility for managing the daily affairs of the firm, including assigning attorneys and investigators to particular cases, monitoring the firm's daily calendar, and managing the financial and personnel operations of the firm.

The evidence at trial established that the defendants conducted the affairs of the Eisen law firm through a pattern of mail fraud and witness bribery by pursuing counterfeit claims and using false witnesses in personal injury trials, and that the Eisen firm earned millions in contingency fees from personal injury suits involving fraud or bribery. The methods [**4] by which the frauds were accomplished included pressuring accident witnesses to testify falsely, paying individuals to testify falsely that they had witnessed accidents, paying unfavorable witnesses not to testify, and creating false photographs, documents, and physical evidence of accidents for use before and during trial. The Government's proof included the testimony of numerous Eisen firm attorneys and employees as well as Eisen firm clients, defense attorneys, and witnesses involved in the fraudulent personal injury suits. Transcripts, correspondence, and trial exhibits from the fraudulent personal injury suits were also introduced.

The racketeering acts considered by the jury related to the defendants' conduct with regard to 18 fraudulent personal injury lawsuits in which the plaintiff was represented by the Eisen firm. The defendants were found guilty of racketeering acts involving the following personal injury cases:

Eisen: Mulnick, Schwartz, Stanton;

Napoli: Ferri, Mulnick, Robbins, Rehberger;

Fishman: Aboud, Schwartz, Tuning, Nieves;

Rella: Miceli, Rehberger, Schwartz;

Gabe: Robbins, Stanton, Nieves;

Morganti: Miceli, Schwartz, Stanton, [**5] Pietrafesa;

Weinstein: Aboud, Schwartz, Tuning, Nieves, Metrano.

The jury convicted all seven defendants of RICO substantive and conspiracy offenses after three weeks of deliberations. n1

n1 Rella's RICO conviction was vacated because the racketeering acts underlying that conviction were not committed within the limitations period.

Discussion

I. Legal Sufficiency of Charges

A. Mail Fraud

Weinstein argues that a scheme to deprive an adversary of money by means [*252] of a civil lawsuit conducted fraudulently does not constitute mail fraud because there is no deprivation of property as defined by the Supreme Court in *McNally v. United States, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987)*. In that case, the Supreme Court held that the mail fraud ststute does not reach schemes to defraud citizens of their right to honest and impartial government but is instead "limited in scope to the protection of property rights." *Id. at 360*. Looking to the legislative history of the statute, which "indicates [**6] that its original impetus . . . was to protect the people from schemes to deprive them of their money and property," the Court concluded that

> the words "to defraud" commonly refer to "wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching."

Id. at 356, 358 (footnote and citation omitted). In reversing the convictions of defendants charged with scheming to deprive the state of its right to honest government by having a stste agency share proceeds with business entities in which the defendants held interests, the Supreme Court emphasized that there was no allegation that the state or its citizens had been deprived of any money or property. *Id. at 360-61*.

Weinstein contends that the right of the civil defendants and their liability insurers to have a judgment in a civil proceeding obtained free of fraud and perjury is

an intangible right not cognizable under the mail fraud statute. The Government responds that the mail fraud predicates at issue here allege a scheme to defraud that comports squarely with the McNally definition [**7] of mail fraud because the Eisen indictment explicitly alleges a scheme to deprive the victims of money.

Weinstein relies on *United States v. Eckhardt, 843 F.2d 989* (7th Cir.), cert. denied, *488 U.S. 839, 102 L. Ed. 2d 81, 109 S. Ct. 106 (1988)*. In Eckhardt, the defendant had operated a phony tax shelter scheme and had committed perjury and submitted false documents in a civil proceeding brought by his investors against the IRS to challenge disallowance of their deductions. The indictment charged him with a scheme

To defraud the United States by impeding and impairing, obstructing and defeating the lawful functions of the Internal Revenue Service in the ascertainment, computations, assessment and collection of the revenue, to wit, income taxes of taxpayer-investors. . . . .

843 F.2d at 996. The Seventh Circuit concluded that this allegation failed to allege mail fraud in light of McNally. It found that the indictment charged the defendant with

interfering with the IRS's proper ascertainment and collection of income taxes. It does not specifically allege that he deprived the government of revenue. . . . It is not sufficient to allege conduct [**8] which could have resulted in the government's failure to collect revenue owed to it. . . . The connection between the charged conduct and the loss of revenue here is too tenuous and speculative to constitute an actual deprivation of money or property.

Id. at 996-97.

Weinstein's reliance on Eckhardt is unavailing. The Eisen indictment contained precisely what was found to be lacking in the Eckhardt indictment: the allegation of a scheme to defraud the litigant of money or property. We have upheld charges similar to those made in Eckhardt where an indictment has alleged a scheme to defraud the Government of money. See *United States v. Porcelli, 865 F.2d 1352* (2d Cir.), cert. denied, *493 U.S. 810, 107 L. Ed. 2d 22, 110 S. Ct. 53 (1989)* (upholding conviction for mail fraud against McNally challenge where defendant was charged with defrauding state government of its right to sue for sales tax he failed to collect); *United States v. Rubin, 844 F.2d 979, 985-86 (2d Cir. 1988)* (upholding conviction for mail fraud where defendant defrauded New York State of public revenues).

Weinstein next contends that even if the civil [**9] defendants were deprived of property, [*253] the only party "deceived" by the alleged fraud were civil juries that awarded the money judgment. Because the juries were not claimed to have been injured, Weinstein argues that the "convergence theory" of mail fraud, which, he contends, requires that the party defrauded and the party injured be identical, see *United States v. Evans, 844 F.2d 36, 39 (2d Cir. 1988)*, is not satisfied. Even if the "convergence theory" is applicable, which we do not decide, n2 its requirements are met here. Weinstein's argument that "the civil defendant is contesting, not relying on, the truth of the allegedly false testimony," Brief for Appellant Weinstein at 36, and is therefore not deceived by a corrupt adversary takes an unrealistically narrow view of the charges in this case and ignores settled authority that perjury and fake evidence defraud the adverse party.

n2 Some District Courts in this Circuit have concluded that this Court's dicta in Evans stands only for the proposition that a civil RICO plaintiff must have been injured to have standing under section 1964. See, e.g., *Shaw v. Rolex Watch U.S.A., 726 F. Supp. 969, 972-73 (S.D.N.Y. 1989); Galerie Furstenberg v. Coffaro, 697 F. Supp. 1282, 1288 (S.D.N.Y. 1988)*. Other district courts outside this Circuit have rejected the convergence theory altogether. See *Texas Air Corp. v. Air Line Pilots Ass'n Int., No. Civ. 88-0804, 1989 U.S. Dist. LEXIS 11149* (S.D. Fla. July 14, 1989); *Lewis v. Lhu, 696 F. Supp. 723, 727 (D.D.C. 1988)*.

[**10]

First, a number of the mail fraud predicates in the indictment alleged fraud that was perpetrated directly on the civil defendants and their liability insurers before the lawsuit reached trial. In several cases, misrepresentations in pleadings and pretrial submissions were made in the hope of fraudulently inducing a settlement before trial. And in cases that went to trial, fraudulent representations concerning the claims were directed at the civil defendants and their insurers in an effort to induce settlement before verdict. In fact, several of the lawsuits listed in the indictment were settled. Even in cases decided by a jury, defendants' misconduct was intended to defraud their adversaries. Litigants depend on the integrity of the conduct of participants in civil proceedings though disputing the validity of their opponents' claims to impose or resist civil liability. It is one thing to challenge the perception, memory, or bias of an opponent's witnesses; it is quite another for a party's lawyer and a witness to concoct testimony that they know has been

wholly fabricated.

Moreover, Weinstein's claim that perjured testimony suborned by the defendants was directed at the civil [**11] juries rather than at the other litigants ignores relevant case law. In *United States v. Rodolitz, 786 F.2d 77* (2d Cir.), cert. denied, *479 U.S. 826, 93 L. Ed. 2d 52, 107 S. Ct. 102 (1986)*, the defendant had brought a fraudulent civil action against his insurance company and recovered a money judgment from the company at trial. In affirming the defendant's conviction for mail fraud, this Court explicitly recognized that false evidence at a civil trial works a fraud not only on the jury but on the opposing party as well. *Id. 786 F.2d at 80-81.* See also *Averbach v. Rival Manufacturing Co., 809 F.2d 1016* (3d Cir.), cert. denied, *482 U.S. 915, 96 L. Ed. 2d 675, 107 S. Ct. 3187 (1987).*

Weinstein also argues that the causation between the fraud and the resulting deprivation of property is too "attenuated." However, the Government need establish only an intent to harm; it is not required to prove that the victim was actually injured as a result of the scheme, see *United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987)*, much less that any injury that did occur resulted solely from the fraud, see *Rodolitz, supra.* In [**12] Rodolitz, we found a sufficient causal link between the defendant's failure to disclose evidence in his trial to recover losses from his insurance company and the resulting judgment against the company, regardless of what the trial jury may actually have relied upon in reaching its verdict.

Finally, Weinstein contends that permitting the mail fraud offenses charged in the Eisen indictment to serve as RICO predicate acts conflicts with the deliberate decision made by Congress in omitting perjury as one of the enumerated RICO predicate offenses within the definition of "racketeering activity." See *18 U.S.C. § 1961*(1). [*254] Contrary to the Government's abrupt dismissal of this argument as "baseless," Brief for Appellee at 36, we recognize that there is some tension between the congressional decision to include federal mail fraud as a predicate offense and to exclude perjury, whether in violation of federal or state law. That tension is illustrated by this prosecution in which the fraudulent scheme consists primarily of arranging for state court witnesses to commit perjury.

Though the tension exists, we do not believe it places the indictment in this case beyond the purview of [**13] RICO. Congress did not wish to permit instances of federal or state court perjury as such to constitute a pattern of RICO racketeering acts. Apparently, there was an understandable reluctance to use federal criminal law as a back-stop for all state court litigation. Nevertheless, where, as here, a fraudulent scheme falls within the scope of the federal mail fraud statute and the other elementa of RICO are established, use of the mail fraud offense as a RICO predicate act cannot be suspended simply because perjury is part of the means for perpetrating the fraud. We do not doubt that where a series of related state court perjuries occurs, it will often be possible to allege and prove both a scheme to defraud within the meaning of the mail fraud statute as well as the elementa of a RICO violation. But in such cases, it will not be the fact of the perjuries alone that suffices to bring the matter within the scope of RICO. In any event, we cannot carve out from the coverage of RICO an exception for mail fraud offenses that involve state court perjuries.

B. State Law Bribery

1. "Witness" as required by § 215.00 of New York Penal Law. Weinstein, Rella, Morganti, and Fishman all [**14] attack various witness bribery racketeering acts by arguing that the individual allegedly bribed was not a "witness or a person about to be called as a witness" within the meaning of Section 215.00 of the New York Penal Law. The statute provides in pertinent part:

> A person is guilty of bribing a witness when he confers, or offers or agrees to confer, any benefit upon a witness or a person about to be called as a witness in any action or proceeding upon an agreement or understanding that (a) the testimony of such witness will thereby be influenced, or (b) such witness will absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding.

N.Y. Penal Law § 215.00 (McKinney 1988).

The New York Court of Appeals has held that a person's status as a witness under section 215.00 "depends upon the evidence he can supply the court, not the immediacy of the need for the evidence," nor whether a subpoena has been issued in order to secure it. *People v. Bell, 538 N.Y.S.2d 754, 760, 73 N.Y.2d 153, 164, 535 N.E.2d 1294 (1989).* The Court stated that if "the evidence is sufficient to support a finding that defendant reasonably should [**15] have believed that the person would be a witness and that he intentionally attempted to influence the witness's testimony . . . the crime is complete." Id.

Weinstein challenges the witness bribery racketeering act in one of the fraudulent tort cases, Metrano, on the ground that there was insufficient evidence that Alberto Troche was a "witness or a person about to be called as a witness" within the meaning of section 215.00. The Metrano case arose from injuries sustained by Metrano when he was shot in the leg by a

Manhattan parking lot ettendant, Alberto Troche, during a row over a parking lot fee. Metrano subsequently retained the Eisen firm, which hrought a civil suit against Troche and Troche's employer, Simone Grossman. The action egainst Grossman was based on allegations thet Grossman should have known that Troche was dangerous and carried a gun. The Eisen firm retained Weinstein as the investigator on the case, which settled on the eve of trial for $ 300,000.

At the Eisen trial, Troche testified that Weinstein had come to his home and offered him $ 5,000 to testify that his employer was eware that he had dangerous propensities and that he carried a gun. Troche [**16] had secretly taped this meeting, and [*255] the tape was introduced into evidence at the Eisen trial.

Troche, having inflicted the injury that formed the basis of the tort action, was clearly someone Weinstein reasonehly should have believed would be a witness in the case. On the tape, Weinstein made repeated references to whet Troche must do "when he comes to court" or when he "takes the stand," showing that he clearly anticipated thet Troche would be e key witness in the case.

In an effort to avoid Troche'e obvlous status as a witness, Weinstein argues that he did not commit hribery against Troche, hut that Troche committed extortion against him. The extortionate conduct, he contends, defeats a section 215.00 violation because it negates the essential element of mens rea in the crime of hribery. Although the tape recording provides some support for Weinstein's contention that Troche might heve offered hie testimony to the highest bidder, other aspects of the tape recording and Troche's testimony at the Eisen trial provide sufficient evidence that Weinstein had the requisite intent to bribe Troche and that Weinstein'a conduct fits easily within the proscription of section 215.00. [**17] Both the tape recording and the trial testimony reveal that Weinstein initieted the contact with Troche, that Weinstein was the first to hroach the suhject of money during their taped meeting, and that Weinstein described the testimony he sought to buy from Troche. Clearly a reasoneble jury could find that Troche was a "person ebout to be called as a witness" in the Metrano trial and thet Weinstein had the requisite intent to hribe Troche.

Rella argues thet Eddie Goldstein, who testified in the Rehberger case was not e "witness" within the meaning of section 215.00, and Morganti makes the same claim with respect to Arnold Lustig, who testified in the Schwertz and Aboud cases, because neither Goldstein nor Lustig had observed the accidents about which they testified but were paid to offer completely fraudulent testimony. The claim thet Goldstein and Lustig do not meet the statutory definition of "witness" because their testimony was entirely fraudulent and thus they had no "evidence" to supply the court is frivolous. In the dictionary sense, e witness is "one who, being present, personally sees or perceives e thing," or one "whose declaration under oeth (or effirmation) [**18] is received as evidence for any purpose." See Black's Law Dictionary 1438 (5th ed. 1979). Section 215.00 contains no indication that it is limited to this core definition of this term to the exclusion of a more functional definition. The section, which explicitly reaches attempts to influence the testimony of a "witness" as well as those "about to be called as a witness," applies to benefits conferred in order to induce someone to hold himself out as a witness and offer wholly fraudulent testimony to the court. The statute is not limited to payments for testimony that is false only in part. Both Goldstein and Lustig were paid money to give false testimony, both were prepared to testify falsely, and both were called to testify falsely at personal injury trials. It is of no consequence that the "evidence" offered and the ststus of the men as "witnesses" was entirely an outgrowth of the defendants' criminal desigus.

2. Falsity of influenced testimony. Section 215.00 provides in pertinent part that a person is guilty of hribing e witness "when he confers, or offers or agrees to confer, any benefit upon a witness or a person about to be called as a witness . . . upon an [**19] agreement or understanding that (a) the testimony of such witness will therehy be influenced. . . ." On its face, the statute requires just two elements of proof: the offer of a benefit to a witness and the egreement or understanding that the witness's testimony will be influenced by such benefit. See *People v. Shaffer, 130 A.D.2d 431, 432, 515 N.Y.S.2d 470, 471* (1st Dep't 1987) ("All that is required for a bribery to be complete is the offer or egreement to confer a benefit upon the defendant's agreement or understanding that the witness' testimony will thereby be influenced."). "Understanding," as used in the statute, has long been construed as tantamount to the defendant's intent, see *People [*256] v. Kathan, 136 A.D. 303, 120 N.Y.S. 1096 (1910)*, and it is not necessary for conviction that the jury find that the bribe'e intended recipient shared that intent. See *People v. Kramer, 132 Misc.2d 753, 505 N.Y.S.2d 769* (2d Dep't), modified on other grounds, *132 A.D.2d 708, 518 N.Y.S.2d 189 (2d Dept. 1986)*. The statute contains no requirement that the benefit [**20] actually be conferred or thet the testimony actually be influenced. See *Shaffer, 130 A.D.2d at 432, 515 N.Y.S.2d at 471*.

Weinstein argued in the District Court that section 215.00 requires two additional elements of proof: (a) that the defendant suhjectively believe that testimony, "influenced" as he desires would be untruthful and (b)

that testimony so "influenced" would in fact be untruthful. Although the District Judge originally incorporated both requirements in the proposed charge, he reconsidered his view following the Government's timely objection. Weinstein now complains about the substance and the timing of that ruling.

The charge that Judge Sifton ultimately gave incorporated one of the elements proposed by Weinstein. He instructed the jurors that with respect to the intent element on the charge of witness bribery, they must find that the defendant paid money to a witness in order to get the witness to modify the substance of his testimony in a way that the defendant believed would be false. He did not instruct the jury that it would be a defense to the crime if by sheer happenstance the testimony so influenced turned out to be true.

The essence of bribery is the intent [**21] to influence improperly the conduct of another by bestowing a benefit, see 39 N.Y. Penal Law § 215.00, at 553 (Practice Commentaries) (McKinney 1988); as there is no requirement that the intended result be accomplished, see *Shaffer, 130 A.D.2d at 432, 515 N.Y.S.2d at 471*, the District Judge properly refused to charge the jury that the fortuity that the testimony, as "influenced," turned out to be truthful would be a defense to the charge. n3

n3 The Government argues that the bribery statute properly applies whenever money is paid to influence testimony, even if money is paid to secure what the defendant believes is truthful testimony. Because the Judge's charge required the jury to find that the defendant believed that he was seeking to influence testimony in a false direction, we need not decide if section 215.00 extends to payments to influence a witness to testify truthfully.

Weinstein also complains that the District Court's charge on the elements of bribery violated Rule 30 [**22] of the Federal Rules of Criminal Procedure, requiring a trial court to issue rulings on requests to charge prior to summations in order to afford the parties an opportunity to frame their closing remarks in light of the court's subsequent legal instructions. See *United States v. Lyles, 593 F.2d 182, 186* (2d Cir.), cert. denied, *440 U.S. 972, 59 L. Ed. 2d 789, 99 S. Ct. 1537 (1979); United States v. Tourine, 428 F.2d 865, 868-69 (2d Cir. 1970)*, cert. denied, *400 U.S. 1020, 91 S. Ct. 581, 27 L. Ed. 2d 631 (1971)*. If the Rule is violated, reversal is required where the defendant can show that he was "substantially misled in formulating his arguments" or otherwise prejudiced. *United States v. Smith, 629 F.2d 650, 653* (10th Cir.), cert. denied, *449 U.S. 994, 66 L. Ed. 2d 291, 101 S. Ct. 532 (1980)*. See *Lyles, 593 F.2d at 186; United States v. Conlin, 551 F.2d 534, 539* (2d Cir.), cert. denied, *434 U.S. 831, 54 L. Ed. 2d 91, 98 S. Ct. 114 (1977)*.

Weinstein was not prejudiced by Judge Sifton's decision, made after the charging conference, to revise the proposed charge as to the elements of witness bribery. When the issue was raised in [**23] the charging conference, the Government objected to the proposed charge. Following an exchange between the Court and the Government on the question of whether the Government had to prove the actual falsity of the testimony sought by the defendant, Judge Sifton said, "All right. I'll consider that exception." Weinstein was on notice that his requested charge was the subject of further consideration and could not have been "substantially misled" by the Court in formulating his summation argument, which contended that the Government had to prove the actual falsity of the testimony sought. Cf. *Wright v. United States, 339 F.2d 578, 579-80 [*257] (9th Cir. 1964)* (reversal required where court did not respond to defense request for pre-summation rulings on requests to charge, advised counsel to "go ahead and argue the case any way you want to argue it," and in its charge rejected the theory of defense offered in summation). Moreover, following the summation, the Court advised Weinstein's counsel that the charge was not in accord with his argument and offered counsel an opportunity to address the jury again. Having ignored this offer, counsel has no valid claim of prejudice. [**24]

II. Sufficiency of Evidence

A. The Mulnick Case -- Racketeering Act Three

The jury found Eisen guilty of witness bribery and found Eisen and Napoli guilty of mail fraud in connection with the Mulnick case. Both Eisen and Napoli contend that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that they committed mail fraud in connection with the Mulnick case. Both defendants also contend that invalidation of the Mulnick predicate would undermine their RICO substantive and conspiracy convictions. Relying on the standard recently employed by this Court in *United States v. Paccione, 949 F.2d 1183, 1198 (2d Cir. 1991)*, cert. denied, *112 S. Ct. 3029, 120 L. Ed. 2d 900 (1992)*, defendants argue that in a RICO case, where one or more predicates is held invalid on appeal, the RICO conviction cannot stand unless the error in submitting the invalid predicate to the jury is demonstrated to be harmless beyond a reasonable doubt. n4 Upon careful review of the record, we conclude that the defendants' sufficiency arguments are unavailing.

n4 In Paccione, the Court found that there was no doubt that the jury would have convicted defendant Paccione of a RICO violation even in the absence of the invalid predicate because eight valid predicates remained and because the pattern of verdicts returned against co-defendants on the RICO count demonstrated that the invalid predicate was not an ingredient in the jury's RICO verdicts.

[**25]

The Mulnick case arose out of injuries suffered by Beth Mulnick in 1979 when she was struck by a car as she was crossing a Manhattan street with her friend Patti Kibel. The Eisen firm sued the car's driver on Mulnick's behalf. Napoli was the attorney assigned to the case, which settled for $ 1 million after the trial testimony of Patti Kibel. At the Mulnick trial, Kibel had testified that Mulnick was crossing the street with the light and within the crosswalk, dropped her glove, and returned several paces to retrieve it, and that the car then ran into her while she was in the crosswalk with the light still in her favor.

At the Eisen trial, Kibel testified that her testimony at the Mulnick trial had been false and that various Eisen firm lawyers, including Eisen and Napoli, caused, or acquiesced in, her false testimony that Mulnick had been crossing with the light. Eisen and Napoli contend that Kibel's testimony at the Eisen trial was too equivocal to support a jury finding that Eisen or Napoli either prepared or caused Kibel to testify falsely at the Mulnick trial.

With respect to Napoli, Kibel testified at the Eisen trial that, prior to her testimony at [**26] the Mulnick trial, she told the man who "prepared" her that her anticipated testimony about the accident was false. Although Kibel could not recall the identity or appearance of the lawyer who conducted this trial, it was established through the testimony of other witnesses and documentary evidence that Napoli was the Eisen firm trial attorney who questioned witnesses at the Mulnick trial. Contrary to Napoli's suggestion, the Government was not required to prove that he specifically formulated the lie to which Kibel was to testify. Instead, as the indictment charged, the Government needed to establish that Napoli had either prepared or caused Kibel to testify falsely. To prove this, it was plainly sufficient to establish that Kibel told Napoli the truth about the Mulnick accident but that Napoli did nothing to dissuade her from testifying to the false version conjured by the Eisen firm and that he caused her to testify falsely by putting her on the [*258] stand and eliciting the perjurious testimony from her.

With respect to Eisen, Kibel's testimony is even more indefinite. Eisen claims that Kibel's wavering testimony at the Eisen trial is insufficient proof that he was the [**27] person who instructed Kibel to provide false testimony in connection with the Mulnick case. Kibel's recollection was vague as to the details of her conversations with Eisen, but on direct examination she stated that she told Eisen the truth about Beth Mulnick's accident and that he instructed her to give a false account of how the accident occurred. However, when questioned on cross-examination as to any particular element of the fabricated story offered by her at the Mulnick trial, Kibel could not recall whether Eisen or someone else in the Eisen firm had suggested the alteration. The Government argues that Kibel's assertion on direct that Eisen instructed her how to testify is not invalidated by her inability to remember on cross-examination what Eisen had said to her on specific topics and who precisely had caused her to testify as she did to particular aspects of her testimony. The Government argues that the weakness of Kibel's testimony was a matter for cross-examination, and that any apparent tension in her testimony was a matter of credibility to be resolved by the jury.

We need not decide whether Kibel's equivocal testimony constituted sufficient evidence to support [**28] the jury's finding with respect to the mail fraud allegation against Eisen specified in the Mulnick predicate act, racketeering act 3. That act (one of three charged against Eisen) alleged that Eisen engaged in criminal activity in connection with the Mulnick case in two distinct ways: (1) that he committed mail fraud for the purpose of executing a scheme to prepare and cause Patti Kibel to testify falsely at trial, and (2) that he caused another person to bribe a New York City Police Officer who was about to be called as a witness in connection with the case. The jury indicated on the verdict form that it found Eisen had committed racketeering act 3 both by committing witness bribery and mail fraud. Eisen does not allege any infirmity with the jury's finding on the witness bribery aspect of the Mulnick predicate. n5

n5 Officer William Mulligan testified at the Eisen trial that he wrote the original police report of the Mulnick accident, which indicated that Kibel had stated at the time of the accident that Mulnick was crossing the street against the light. He further testified that he had been offered a bribe several days before the Mulnick trial by Eisen firm investigator Frank Laine to testify that he could not recall Kibel's statement. Laine, who testified under a grant of immunity at the Eisen trial, admitted that he had indeed attempted to bribe the officer and had done so

at Eisen's request.

[**29]

A finding either of mail fraud or of witness bribery would have been sufficient to support the Mulnick racketeering act. Thus the invalidation of one of two sufficient bases specifically found by the jury to support this predicate would not undermine the jury's finding that Eisen committed a racketeering act with respect to the Mulnick case. *Cf. Griffin v. United States, 116 L. Ed. 2d 371, 112 S. Ct. 466, 469-74 (1991)* (even a general verdict in a criminal case is to be upheld on appeal against a claim of insufficient evidence to support one of alternative bases for conviction whenever the evidence suffices for at least one basis). In light of the fact that Eisen's challenge does not compromise the validity of the Mulnick predicate, and the ample evidence that the Mulnick case was fraudulent and that Eisen participated in the fraud, we have no doubt that the jury would have convicted Eisen on the RICO substantive and conspiracy charges even if it had found that the Mulnick racketeering act rested only on bribery. Cf. *Pacclone, 949 F.2d at 1198* (jury would have convicted defendant of a RICO violation even in the absence of an [**30] invalid predicate).

B. The Pietrafesa Case -- Racketeering Act Twenty-Six

Morganti claims that there was insufficient evidence that she committed mail fraud in connection with the Pietrafesa case. That case arose from injuries sustained [*259] by Carmella Pietrafesa when she slipped on a sidewalk outside a supermarket in Greenwich Village. The Eisen firm sued the supermarket on behalf of Pietrafesa. The Eisen firm relied on the testimony of Morganti's 70-year-old mother, Helen Gaimari, who lived four blocks from the supermarket, to establish that the supermarket had prior notice of the sidewalk defect. At trial, Gaimari testified that she gave Pietrafesa her name at the time of the accident, had fallen because of the same defect months before, and had previously complained to the supermarket about the defect. It was not disclosed to defense counsel in the Pietrafesa case that Gaimari was the mother of Morganti, the Eisen firm's office manager. The jury returned a verdict for Pietrafesa of approximately $ 35,000.

Morganti argues that the Government adduced no affirmative evidence that Morganti caused her mother to testify, or that her mother, Helen Gaimari, testified [**31] falsely. In evaluating this claim we must credit every inference that can be drawn in the Government's favor, whether from direct or circumstantial evidence. See, e.g., *United States v. Parker, 903 F.2d 91, 96-97* (2d Cir.), cert. denied, *112 L. Ed. 2d 158, 111 S. Ct. 196 (1990)*. Moreover, the jury is free to draw negative inferences from an untruthful witness's testimony as long as there is affirmative testimony to supplement or corroborate those negative inferences. See *United States v. Marchand, 564 F.2d 983, 985-86, 1000-01 (2d Cir. 1977)*, cert. denied, *434 U.S. 1015, 54 L. Ed. 2d 760, 98 S. Ct. 732 (1978)*.

The Government points to the testimony of five witnesses to support the inference that Morganti caused her mother to testify and that the testimony was false. The plaintiff, Carmella Pietrafesa, testified in a deposition preceding her personal injury trial that she had not gotten the names of the people who helped her up at the time of her accident. In contrast, she testified at her own trial and at the Eisen trial that an elderly woman who turned out to be Gaimari picked her up and gave her a piece of paper containing Gaimari's name and [**32] number. Pietrafesa also testified at the Eisen trial that during the course of trial preparation she had had a few discussions with Morganti concerning her case.

Frank DeSalvo, an Eisen firm attorney, testified about his handling of the Pietrafesa case. He stated that he sent out a letter to defense counsel on November 11, 1982, stating that there were no witnesses to Pietrafesa's accident. DeSalvo testified that he represented Pietrafesa at the December 20, 1982, deposition in which she stated that she did not get the name of the person who helped her up. He further testified that he sent a second letter to defense counsel in the Pietrafesa case three days after the deposition that listed Helen Gaimari, Morganti's mother, as a notice witness to Pietrafesa's accident. However, even though DeSalvo had dated Morganti's daughter and had met Gaimari, he claimed to know the older woman only as "Grandma Helen."

Evan Torgan, another attorney formerly associated with the Eisen firm, testified that Morganti and Eisen assigned him the cases that he tried at the Eisen office, that he had tried the Pietrafesa case in November 1984, and that it was his practice to report [**33] trial verdicts to Morganti. He further testified that he was dating Morganti's daughter around the end of 1984 or the beginning of 1985 but also claimed that he did not learn that Gaimari was Morganti's mother until after the Pietrafesa trial ended.

Gaimari testified at the Eisen trial that sometime after the accident, she was called by a lawyer who asked her to testify at the Pietrafesa trial; the lawyer indicated that he knew Gaimari was Morganti's mother.

Robert Steindorf, a defense attorney at the Pietrafesa trial, testified that Gaimari was a crucial witness against his client because she was the only notice witness at that

trial who was not related to Pietrafesa.

Giving credence to every inference that could be drawn in the Government's favor from the direct and circumstantial evidence elicited from these witnesses, we find that [*260] a reasonable juror could find that Gaimari gave false testimony concerning her presence at the Pietrafesa accident. We are, however, unable to conclude that a reasonable juror could find, beyond a reasonable doubt, that Morganti caused Gaimari to give false testimony in the Pietrafesa case. The Government invites us to rely on [**34] Morganti's familial relation to Gaimari as well as Morganti's role in the Eisen firm. While these factors may indicate that Morganti had abundant opportunity to cause Gaimari to give false testimony, they provide an insufficient basis for a reasonable juror to conclude beyond a reasonable doubt that Morganti played a role in having her mother testify falsely at the Pietrafesa trial. Although, having persuaded the jury that Gaimari was untruthful, the prosecutor might have invited the jury to disbelieve Gaimari's denials of her daughter's involvement, without affirmative evidence in corroboration, such a negative inference is, by itself, insufficient to support the conviction. *Marchand, 564 F.2d at 986.* "A jury's verdict will be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." *United States v. Mulheren, 938 F.2d 364, 368 (2d Cir. 1991)* (citations omitted) (emphasis in original). In this case Morganti has met the very heavy burden of demonstrating that the evidence at trial was insufficient to prove her guilt beyond a reasonable doubt.

We must now determine whether the invalidation [**35] of this racketeering act undermines Morganti's substantive and conspiracy RICO convictions. We conclude that the error in submitting the invalid predicate to the jury was harmless beyond a reasonable doubt. See *Paccione, 949 F.2d at 1198.* Three valid racketeering acts remain, those relating to the Miceli, Schwartz, and Stanton cases. In each of these cases there was direct and unequivocal testimony that Morganti was an active participant in the cabal to falsify testimony. Furthermore, the pattern of verdicts returned against co-defendants confirms our conclusion that the jury would have returned the RICO convictions in the absence of the invalid predicate. Eisen, Gabe, and Rella were convicted of the RICO counts on the basis of a jury finding that they had each committed three racketeering acts. Morganti shares a pair of valid predicates in common with those of Eisen and Rella: Morganti and Eisen were both found guilty of the Schwartz and Stanton predicates; Morganti and Rella were both found guilty of the Miceli and Schwartz predicates. The acts alleged against Morganti in the Miceli, Schwartz, and Stanton predicates occurred, [**36] respectively, in 1983, in 1984, and between 1984 and 1988, and thus the substantive RICO conviction remains timely. Because the jury has already found that these predicates relate to each other as well as to the enterprise, and because we have no hesitancy in finding that, even without the Pietrafesa predicate, these three racketeering predicates posed a threat of continuity, we affirm Morganti's substantive and conspiracy RICO convictions. See *United States v. Minicone, 960 F.2d 1099, 1106* (2d Cir.) (to establish pattern of racketeering, prosecution must show racketeering predicates are horizontally and vertically related, and that they amount to or pose threat of continued criminal activity), cert. denied, *117 L. Ed. 2d 648, 112 S. Ct. 1511 (1992).*

III. Leak of Grand Jury Testimony

Eisen argues, on behalf of all defendants, that he is entitled to a hearing on his claim that he was prejudiced by a leak of grand jury testimony. Shortly before the trial began, The Village Voice published an article about the case. The author of the article purported to summarize the contents of the testimony of four grand jury witnesses and indicated that the source of [**37] the information was not the witnesses themselves. In fact, the story indicated that one of the witnesses whose testimony was outlined had refused to speak to the Voice about his grand jury appearance. After the publication of the article, Eisen moved for a hearing to determine whether grand jury secrecy had been violated. Eisen claimed that a leak could prejudice his trial because trial witnesses exposed to the [*261] article could tailor their testimony to dovetail with the sworn testimony of others. The District Court denied the request for a hearing but referred the case to the Department of Justice ("DOJ"), requesting an expedited investigation.

After trial, almost seven months since the matter was referred to DOJ and in spite of some prodding by Judge Sifton, little if any progress had been made on the investigation, and Eisen renewed his request for a court hearing. The Government was quick to ascertain the status of the DOJ investigation and informed the Court that DOJ investigators had formed a preliminary plan for investigation and would soon begin to conduct interviews concerning the matter. The District Court again rejected Eisen's request, stating that it had no obligation [**38] to supervise or instigate an investigation in the absence of a prima facie showing of prejudice to the defendant as a consequence of the alleged leak. The Judge noted that Eisen had had opportunity and incentive to develop evidence of "cross-pollination" among witnesses due to the alleged leak but had failed to do so. The Court also noted its reluctance to hold a hearing while there was an ongoing federal investigation.

At oral argument of this appeal, the Government maintained that the DOJ investigation had concluded, that the investigation had shed no light on whether or how the integrity and secrecy of the grand jury proceeding had been compromised, and that the results of the investigation had been forwarded to Eisen's counsel. The Government also represented to this Court that the results would be forwarded to the District Court.

A breach of grand jury secrecy can jeopardize the defendant's right to a fair trial before a petit jury. See *United States v. Friedman, 854 F.2d 535, 583 (2d Cir. 1988)*, cert. denied, *490 U.S. 1004, 109 S. Ct. 1637, 104 L. Ed. 2d 153 (1989)*. However, a defendant seeking reversal or a hearing regarding alleged grand jury abuse must show [**39] prejudice or bias. See *Id. at 583-84* (in the absence of showing of prejudice, district court's refusal, without holding a hearing, to grant post-trial relief for alleged grand jury leaks not error); see also *United States v. Helmsley, 866 F.2d 19, 22 (2d Cir. 1988)* (noting approval of district court procedure of referring to Department of Justice charges of prosecutorial misconduct in leak of grand jury testimony), cert. denied, *490 U.S. 1004, 104 L. Ed. 2d 154, 109 S. Ct. 1638 (1989)*.

Eisen contends that he has made a prima facie showing of prejudice. He asserts that the trial record indicated that cross-pollination as a result of the grand jury leaks seemingly had occurred in at least one instance: one witness's testimony in the grand jury about backdating a report, disclosed in the Voice article, was echoed in another witness's trial testimony about the report, although that witness had never mentioned any backdating at his grand jury appearances. While this confluence of testimony may be suspect, we agree with the District Court that the defendants had the opportunity and incentive to develop such possibilities of prejudice into evidence of [**40] prejudice during the cross-examination of witnesses.

Eisen argues that it would have been "foolhardy" to seek to establish evidence of cross-pollination during cross-examination, that a defendant should not be required to pursue an agenda distinct from his trial agenda, and that he should not be faulted for forgoing the opportunity where he was led to believe that the DOJ was making prompt inquiries. We disagree. If, on cross-examination a defendant had been able to expose that prosecution witnesses had changed their testimony in response to the testimony of other witnesses, that fact would have been devastating to the Government and entirely consistent with the defendant's "trial agenda." Moreover, a defendant's interest in showing that the Government's case has profited from a breach of grand jury secrecy is distinct from the DOJ's inquiry into whether a leak has occurred and who was responsible. Referring the matter to the DOJ did not absolve Eisen of the obligation to discover and come forward with some evidence of prejudice, if any existed, in order to obtain [*262] a hearing or further relief on the ground that grand jury secrecy had been violated. The District Court did not [**41] err in denying a hearing.

IV. Testimony from Hostile Government Witnesses

Eisen argues that he was deprived of a fair trial because the Government was permitted to call numerous witnesses associated with the defendants and to elicit from them trial testimony that the Government anticipated would be perjurious and srgued to the jury was in fact perjurious. In its opening, the prosecution told the jury that it would call some witnesses "who have refused to give up the lie or the fraud of the particular case that they were involved in." The Government made this argument with regard to a portion of the testimony of 11 of its 75 witnesses. The District Judge allowed the practice, reasoning that it was not unduly prejudicial because the witnesses' testimony, in fact, tended to exculpate the defendants, and because the prosecutor confined himself to arguing that each witness persisted in his lie from personal motives rather than at the behest of the defendants. Eisen argues that this evidence should have been excluded because it was irrelevant, and even if it was relevant, Eisen argues, it should have been excluded because the danger of unfair prejudice substantially outweighed its probative [**42] value.

Eisen contends that the testimony from these witnesses exculpating the defendants was not probative of the Government's theory of the case and therefore should not have been presented to the jury. The Government notes, however, that impeachment of hostile government witnesses is admissible as negative inference evidence, see *Marchand, 564 F.2d at 985-86*, and that the testimony of these hostile witnesses provided other affirmative proof that was important to the Government's case.

In arguing that this practice should not have been permitted, Eisen relies on two sets of cases that are clearly distinguishable. First, Eisen points to a series of cases that hold that while a jury may be permitted to draw negative inferences from disbelieved testimony, a case cannot go to a jury solely on that basis. n6 Second, Eisen relies on a series of cases that hold that a party may not call a witness whose testimony it knows to be adverse for the sole purpose of impeaching him and thereby presenting evidence to the jury that would not otherwise be admissible. n7 The first line of cases is inapposite because in this case there was independent evidence to

support the Government's [**43] case. The second line of cases is inapplicable because the Government did not call these witnesses as a mere subterfuge to get before the jury evidence not otherwise admissible.

n6 See *Martin v. Citibank, N.A., 762 F.2d 212, 217-18 (2d Cir. 1985); United States v. Jenkins, 510 F.2d 495, 499 (2d Cir. 1975); Davis v. National Mortgage Corp., 349 F.2d 175, 178 (2d Cir. 1965); Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952); Parisi v. Towse, 45 F.2d 962, 964 (2d Cir. 1930).*

In Dyer v. MacDougall, Judge Learned Hand observed that "the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *201 F.2d at 269.* However, the Court went on to hold that "although it is therefore true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him." Id. [**44]

n7 See *United States v. Morlang, 531 F.2d 183, 189-90 (4th Cir. 1975); United States v. Johnson, 802 F.2d 1459, 1466 (D.C. Cir. 1986).*

Federal Rule of Evidence 607 provides: "The credibility of a witness may be attacked by any party, including the party calling the witness." Rule 607, having no special restrictions, allows the Government to impeach its own witnesses. *United States v. DeLillo, 620 F.2d 939, 946-47* (2d Cir.), cert. denied, *449 U.S. 835, 101 S. Ct. 107, 66 L. Ed. 2d 41 (1980).* Where the Government has called a witness whose corroborating testimony is instrumental to constructing the Government's case, the Government has the right to question the witness, and to attempt to impeach him, [*263] about those aspects of his testimony that conflict with the Government's account of the same events. Id. Here, the testimony of the hostile witnesses provided affirmative proof that was necessary to construct the Government's case, and thus the Government was entitled to question these witnesses and to invite the jury to disbelieve that portion of their [**45] accounts that contradicted the prosecution's theory of the case.

Eisen claims that, if the Government is allowed to proceed in this fashion, it could "routinely pre-empt the defendant, offer his 'defense,' and effectively preclude him from presenting his case as he and his lawyers determined to be in his best interests." Brief for Appellant Eisen at 31 n.34. Eisen complains that in eliciting testimony exculpatory of the defendants, the Government, in essence, foisted witnesses and testimony onto the defendants' case thereby curtailing their ability to shape their own defense. Certainly, a defendant should be allowed to present his best defense consistent with the bounds of the law and the limits of the practicable. But the defendants cannot blame the Government's actions in this case for frustrating their ability to put on such a defense. The Government called as witnesses those who had participated in various ways in the personal injury suits underlying the allegations in the indictment and who clearly had relevant evidence to offer the Court. The Government need not confine itself to fragments of their testimony just because the witnesses persist in repeating untruthful portions. [**46]

A finding that the evidence was relevant and that the practice at issue is not proscribed does not, however, end the inquiry. Under Federal Rule of Evidence 403, the trial judge must determine if relevant evidence should be excluded because its "probative value is substantially outweighed by the danger of unfair prejudice." *United States v. Robinson, 560 F.2d 507, 513-14 (2d Cir. 1977)* (in banc), cert. denied, *435 U.S. 905, 55 L. Ed. 2d 496, 98 S. Ct. 1451 (1978).* We give the trial judge wide discretion in assessing the balance, and his ruling will not be overturned unless he acted "arbitrarily or irrationally." *Id. at 515.* Eisen does not argue that the Government introduced highly prejudicial or inflammatory evidence in order to impeach these witnesses; instead he argues that, in the context of a case revolving around the subornation of perjury, the very argument that the witnesses were lying was highly prejudicial. Eisen contends that because the defendants are accused of suborning these witnesses' perjury (or conspiring with them to suborn perjurious testimony) in the underlying personal injury trials, the jury will naturally assume that the Government [**47] accuses the defendants of complicity in these criminal trial lies as well. The Court, however, had foreclosed this line of argument and the prosecutor was careful to attribute the alleged lies to the personal motivations of these witnesses. The District Court acted reasonably in concluding that the negative inference evidence need not be excluded as unfairly prejudicial simply because of the risk that the jury might, nonetheless, embrace a theory of causation eschewed by the prosecution.

V. Statute of Limitations

Gabe and Rella both contend that their convictions are barred by the five-year statute of limitations period of *18*

U.S.C. § 3282 (1988). Gabe argues that all of the racketeering acts with which he is charged fall outside the five-year limitations period. In making this argument, Gabe incorrectly assumes that the mail fraud claims date from the time the fraud was conceived or from the time of the underlying civil trial. However, the statute of limitations in a mail fraud case runs from the date of the charged mailing, notwithstanding that the defendant's actions concerning the scheme to defraud occurred before the statutory period. See *United States v. Read, 658 F.2d 1225, 1240 (7th Cir. 1981);* [**48] *United States v. Ashdown, 509 F.2d 793, 797-98* (5th Cir.), cert. denied, *423 U.S. 829, 46 L. Ed. 2d 47, 96 S. Ct. 48 (1975).* See also *United States v. Weinberg, 656 F. Supp. 1020, 1026 (E.D.N.Y. 1987).* Because at least one of the proven [*264] mailings in the racketeering acts of which Gabe was found guilty occurred within five years of the filing of the original indictment, Gabe's timeliness claim fails.

Rella argues that because the substantive RICO count against him was dismissed as untimely, the RICO conspiracy count must fail as well. All three of the racketeering acts that the jury found Rella to have committed fall outside of the five-year limitations period, and thus the substantive RICO count was properly dismissed. However, the statute of limitations for a RICO conspiracy does not begin to run until the objectives of the conspiracy have been either achieved or abandoned. *United States v. Persico, 832 F.2d 705, 713 (2d Cir. 1987),* cert. denied, *486 U.S. 1022, 108 S. Ct. 1995, 100 L. Ed. 2d 227 (1988).* The jury found that the RICO conspiracy comprehended conduct that occurred as late as 1988, and because there was no evidence that the criminal [**49] objectives of the conspiracy were abandoned, this count against Rella was not time-barred.

VI. Ineffective Representation

Napoli appeals from Judge Sifton's denial of his section 2255 petition for a new trial. In that petition, Napoli claimed that his Sixth Amendment rights to effective assistance of counsel had been violated as a result of an alleged conflict of interest of his trial counsel, Gerald L. Shargel. The alleged conflict of interest was said to arise from Shargel's disqualification in an unrelated case, see *United States v. Gotti, 771 F. Supp. 552 (E.D.N.Y. 1991),* which occurred during the trial of this case. We affirm the District Court's denial of the petition.

Napoli argues that Shargel's disqualification in the Gotti case resulted in both a per se and an actual deprivation of Napoli's Sixth Amendment right to effective assistance of counsel in this case. In order to sustain a claim that a per se violation occurred, a defendant must establish that his lawyer suffered from an actual conflict of interest with regard to presenting a vigorous defense of the defendant. See *United States v. Aiello, 900 F.2d 528, 530-31 (2d Cir. 1990).* [**50] Upon a showing of such a conflict, a defendant need not demonstrate prejudice because a conflict inhibiting a lawyer's performance is such an affront to the right to effective assistance of counsel that we have found that such a circumstance demonstrates a denial of that right. Id. We have found a per se Sixth Amendment violation where trial counsel was implicated in the very crime for which his client was on trial. See *United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984).* We also applied a per se rule where a defendant was represented by a person not authorized to practice law. See *Solina v. United States, 709 F.2d 160 (2d Cir. 1983).* In both cases, we found that counsel had reason to fear that vigorous advocacy on behalf of his client might provoke inquiries on the part of the court or prosecutor that might expose the lawyer to criminal liability or other sanction. See *Cancilla, 725 F.2d at 870; Solina, 709 F.2d at 164.* However, this Court's decision in Aiello, makes clear that Napoli's allegations fail to support a per se claim. In Aiello, we rejected the argument that [**51] an attorney under investigation for obstruction of justice and tax evasion at the time of the defendant's trial on narcotics charges had suffered from an actual conflict of interest constituting a per se violation of the defendant's Sixth Amendment right. The four factors on which this Court relied in rejecting Aiello's conflict of interest claim are also present here. First, unlike the facts in Cancilla, the attorney's purported activity (i.e., his alleged involvement with the Gotti organization) was totally unrelated to the mail fraud and witness bribery crimes for which Napoli was being tried. See *Aiello, 900 F.2d at 531.* Second, there is no allegation that Shargel's representation of Napoli in the case was the "impetus" for the investigation into Shargel's involvement with the Gotti defendants. See *Aiello, 900 F.2d at 531-32.* Third, Napoli has offered no basis upon which to believe that Shargel's defense of Napoli was intended to please or impress the Gotti prosecutors, who did not participate in the Eisen case. See *Aiello, 900 F.2d at 532.* Finally, unlike [*265] the attorney in Solina, there [**52] is no question that Shargel was authorized to practice law at all times during this case. See *Aiello, 900 F.2d at 532.*

There is no suggestion that Shargel's vigorous representation of Napoli would have subjected him to sanction or risked exposure of any wrongdoing on his part. And any claim that Shargel's attention may have been "diverted" by the disqualification proceeding in the Gotti case is insufficient to establish an actual conflict of interest. A theoretical or merely speculative conflict of

interest will not invoke the per se rule. See *Aiello, 900 F.2d at 532.*

Because Napoli has failed to show an actual conflict of interest, he must overcome the presumption that his counsel's conduct was reasonable hy satisfying the two-pronged standard of *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).* See *United States v. Cruz, 785 F.2d 399, 405 (2d Cir. 1986).* Napoli must show that (1) "counsel'a representation feli below an objective standard of reasonahleness" under "prevailing professional norms" and (2) "a reasonahle prohahility that, hut for counsel's unprofessional errors, the result of the [**53] proceeding would have been different." *Strickland, 466 U.S. at 688, 694.*

Out of a trial record of almost 10,000 pages, Napoli culls five instances of alleged deficiencies in Shargel's performance. On review of the record, we are convinced that Shargel's overall performance was vigorous, sustained, and effective. Furthermore, we find that none of the five instances complained of falla "outside the wide range of professionally competent assistance." *Id. at 690.*

Napoli first points to Shargel'a atipulation that a disputed mailing in the Robbins case had been mailed. Shargel decided to atipulate to the fact of mailing once informed that James LaRossa, co-defendant Elsen's attorney, had entered into a stipulation with the Government to that effect. Napoli now claims that the author of the letter would have testlfied that the letter had been hand-delivered and that it was incompetent for Shargel to stipulate to the contrary. Napoli ignores evidence that the relevant document had in fact been mailed a suhsequent letter written by its author so stating. Moreover, even if Shargel did not personally verify this fact, it was reasonahle for him to [**54] rely on the representation of co-defendant'a counsel that the author admitted the mailing. Furthermore, had the author been called to take the stand to testify to hand delivery, hia testimony would have been impeached hy hia previous letter maintaining that it had been mailed. See Aiello, 900 F.2d ate 532-33 (failure to call exculpatory witness not ineffective representation because testimony could have been impeached).

The next four instances of claimed ineffective assistance relate to decisiona that "fall squarely within the ambit of trial strategy, and, if reasonably made," cannot support an ineffective assistance claim. See *United States v. Nersesian, 824 F.2d 1294, 1321* (2d Cir.), cert. denied, *484 U.S. 957, 108 S. Ct. 355, 98 L. Ed. 2d 380 (1987).* As his second example, Napoli claims that Shargel should have advised him to testify on his own behalf, and that Shargel should have done a more thorough joh of impeaching two prosecution witnesses. "The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in hy defense attorneya in almost every trial." Id. It was a reasonable [**55] tactical decision to rely exclusively on attacking the Government's witnesses and presenting independent testimony rather than to suhject Napoli to all of the risk attendant on cross-examination. "Decisions whether to engage in cross-examination, and if so to what extent and in what manner, are similarly strategic in nature." Id. Shargel had suhjected both of these witnesses to vigorous cross-examination. As Judge Sifton found, Shargel could have reasonably concluded that further cross-examination on relatively unimportant matters would have confused or fatigued the jury.

[*266] As the third instance, Napoli points to Shargel'a decision not to lay hlame for the charged crimes on the other defendants. Clearly this was a reasonahlo strategic decision. An effort to blame the other defendants might have provoked retaliation in the same vein, and the Government would have been the sole beneficiary of such a development.

Fourth, Napoli claims that, in support of Napoli'a motion for sequestration of tho jury, Shargel should have introduced newspaper clippinga referring to the Government's accusations against Shargel in the Gotti case. While thia might have been the preferable course, [**56] wo cannot say that Shargel'a omission was below an objeotive level of competence ainoe none of the other defense attornoys included such clippinga in their similar motiona but instead relied on paraphrasing. Furthermore, Shargel did submit a number of the press accounts in support of Napoli'a claim of error in failure to sequester made in hia motion for a new trial. The issue, including the nature and content of the articles, was thus properly preserved for appeal, and no prejudice occurred from the initial failure to include the materials.

Finally, Napoli claims that Shargel's failure to attack the Government in hia summation is evidence of a change in his attitude toward the Government following the disqualification motion. Shargel'a summation lasted an entire day and occupies almost two hundred pages of transcript. Shargel assailed the Government'a evidence in each of the racketeering acta charged against Napoli and reviewed the exculpatory testimony. Furthermore, he clearly was not seeking to curry favor with the prosecution when he claimed that the Government "paid their witnesses with a price that we could never afford," had intentionally overlooked Ita own witnesses' inconsistent [**57] atatements, and had been overly "righteous and sanctimonious" in discrediting exculpatory testimony.

The comprehensive and vehement nature of Shargel'e summation refutes Napoli'e claim. See *Nersesian, 824 F.2d at 1321.*

In none of the five instances complained of did Shargel'e performance fall below an objective standard of reasonableness, and Nepoli does not even attempt to demonstrate e reasonable probability that the result of the proceeding would have been different absent the allegedly unprofessional conduct.

VII. Prosecutorial Misconduct and Prejudicial Publicity Regarding the Gotti Case

On Friday, February 22, 1991, efter the jury in the Eisen trial had begun deliberations, argument was heard on an epplication by the prosecution in the Gotti case to disqualify several of the defense lewyers in that case including Shargel, who was then representing Nepoli in the Eisen trial. Nepoli contends thet the prosecutors in the Gotti case acted improperly by repeating in open court allegetions made egainst Shargel in the Government's sealed pepers, and that these allegetions improperly affected the jury's deliberstions in the Eisen case. Napoli [**58] also argues that the Court improperly denied his motion to sequester the jury.

"If a prosecutor abuses her discretion by intentionally attempting to distort the fact-finding process, then a due process violation exists." *United States v. Angiulo, 897 F.2d 1169, 1191* (1st Cir.), cert. denied, *111 S. Ct. 130, 112 L. Ed. 2d 98 (1990).* But Napoli does not claim that the government prosecutors in the Gotti case intentionally provoked press coverage with the aim of prejudicing the jury in the Eisen case, nor does he offer any evidence that the Gotti prosecutors even anticipated such e result. Moreover, the District Court took suitable precautions to ensure that the jury was not exposed to the press accounts of the allegations.

When the problem was brought to Judge Sifton's ettention on the Friday of the hearing in the Gotti case, the Judge determined thet he would speak with each juror individually in chambers ebout evoiding ell news medie over the weekend. Defense counsel objected to individual interviews, arguing that it would magnify the problem, [*267] and instead requested sequestration. The Judge denied sequestration, but conducted e general inquiry [**59] of the jury, asking the jury to evoid all news medie over the weekend and providing e means by which concerned jurors could call the court to ascertain the progress of then pending events in the Persian Gulf without resort to the media. The jurors geve their generel agreement that they could comply.

The steps taken to protect the integrity of the jury deliberstions were adequate under the circumstances. In *United States v. Casamento, 887 F.2d 1141, 1154-55 (2d Cir. 1989),* cert. denied, *493 U.S. 1081, 107 L. Ed. 2d 1043, 110 S. Ct. 1138 (1990),* this Court found that the "great deal" of medie ettention surrounding an organized crime trial did not render it unfair in light of Judge Leval's instruction to the jury to avoid press accounts ebout the case. We held that "in the absence of evidence to the contrary, we will presume the jury followed these admonitions and evoided exposure to news reports about the trial." Id. Although Judge Leval conducted an individual interview with the jurors, the defendants here specifically requested that no such individual voir dire be conducted for fear of magnifying the problem. See also *United States v. Gaggi, 811 F.2d 47, 53* (2d [**60] Cir.), cert. denied, *482 U.S. 929, 96 L. Ed. 2d 701, 107 S. Ct. 3214 (1987).*

Moreover, as in Geggi, we may find confirmation of the jury'e ebility to render an impartiel verdict in "the care which it took in its deliberstions." *811 F.2d at 53.* As the District Court noted in rejecting these claims post-trial, jury deliberations lasted from February 14 through March 4, 1991, with several notes sent out each day requesting to review exhibits or to heve extensive testimony read back. And in its determination, the jury carefully distinguished among defendants and among predicate acts, finding 16 of 22 racketeering acts proven.

In the absence of any suggestion that the prosecutors in the Gotti case were acting in bad faith, in light of the fact that the allegations did not concern the trial in this case, the defendants on trial, or any of the events at issue in the case, and giving due weight to the district court'e cautionary measures, we find no due process violetion and reject Nepoli's request for e new trial.

Furthermore, Nepoli'e claim that the District Court erred in denying hie motion to sequester the jury in response to the Gotti proceedings is without merit. "The decision [**61] to sequester the jury to evoid exposure to publicity is committed to the discretion of the court, and failure to sequester the jury can rarely be grounds for reversal." *United States v. Salerno, 868 F.2d 524, 540* (2d Cir.), cert. denied, *491 U.S. 907, 109 S. Ct. 3192, 105 L. Ed. 2d 700 (1989).* Judge Sifton did not abuse hie discretion and his precautions seem entirely adequate to the remote threat of prejudice from the expected publicity concerning Napoli's ettorney and his representation of another client in e completely unrelated matter.

VIII. Sentencing

Fishman, Nepoli, Gabe; and Rella contend that the District Court erred in epplying the Sentencing

Guidelines in sentencing them on the RICO conspiracy count. Each of these defendants asserts that, for various reasons, his liability for participation in the conspiracy cannot extend past November 1, 1987, the effective date of the Guidelines. We conclude that the District Court correctly applied the Sentencing Guidelines to each of these defendants.

This Court has determined that persons convicted of offenses that began before and continued after November 1, 1987, (so called "straddle crimes") would, upon sentencing, [**62] be subject to the Sentencing Guidelines. See *United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989)*. The RICO conspiracy charged in this case ran from January 1981 to June 1990, and thus straddled the effective date of the guidelines. Moreover, the jury found three defendants--Eisen, Gabe, and Morganti--guilty of a predicate act of mail fraud in connection with the Stanton case, which included a mailing on March 29, 1988. Thus, the conspiracy of which the defendants were [*268] convicted continued after the effective date of the guidelines.

Gabe complains that the jury was not asked to determine whether the conspiracy straddled the effective date of the Guidelines. However, for purposes of applying the Guidelines, "the period during which an offense occurs is considered a 'sentencing factor' to be determined by a judge--instead of an element of the offense to be determined by a jury." *United States v. Bloom, 945 F.2d 14, 17 (2d Cir. 1991)*. The District Court did not err in finding by a preponderance of the evidence that the conspiracy extended beyond November 1, 1987. Gabe also argues that he should not have been sentenced under the [**63] Guidelines because he played a "minimal role" in the conspiracy. The extent of Gabe's role, while relevant in determining the appropriate length of his sentence within the Guidelines, see U.S.S.G. § 3B1.2 (Guideline adjustments for mitigating role in the offense), has no bearing on the threshold question of whether the Guidelines should apply to his conspiracy conviction.

Napoli argues that application of the Guidelines to his conviction violates ex post facto principles because he "did nothing after November 1, 1987 and did not plan anything which ultimately transpired after that date." Brief for Appellant Napoli at 140. The Court may find a continuation of conspiratorial liability even though the particular defendant has ceased to engage in overt conduct relating to the conspiracy prior to November 1, 1987, if it was foreseeable that the conspiracy would continue past that date. See, e.g., *United States v. Devine, 934 F.2d 1325, 1332* (5th Cir.), cert. denied, *112 S. Ct. 349, 116 L. Ed. 2d 288 (1991)*. This holding derives from the basic principle that conspirators are generally held liable for the known or reasonably foreseeable acts of all other co-conspirators [**64] committed in furtherance of the conspiracy. See *Pinkerton v. United States, 328 U.S. 640, 647, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946)*. Contrary to Napoli's contention, the acts of co-conspirators occurring after November 1, 1987, may be attributable to a defendant for purposes of the application of the Sentencing Guidelines in the absence of evidence that the defendant somehow "caused" those acts. See *United States v. Rosa, 891 F.2d 1063, 1068-69 (3d Cir. 1989)* (applying Guidelines to co-conspirator who did nothing to further the conspiracy after 1986 in the absence of any proof that he affirmatively renounced the conspiracy prior to November 1, 1987). Defendants committing no acts in furtherance of a conspiracy after the effective date of the Guidelines are not subject to ex post facto punishment because they could have "taken steps to prevent the final element of the crime from occurring," *United States v. Atkins, 925 F.2d 541, 549 (2d Cir. 1991)*, before the statute became effective; they could have withdrawn from the conspiracy. See *Rosa, 891 F.2d at 1069*. Napoli does not claim that he ever withdrew from the conspiracy. [**65]

Rella and Fishman contend that they affirmatively withdrew from the conspiracy before the effective date of the Guidelines. In order to demonstrate withdrawal from a conspiracy, the defendant has the burden of proving "some act that affirmatively established that he disavowed his criminal association with the conspiracy . . . and that he communicated his withdrawal to the co-conspirators." *United States v. Minicone, 960 F.2d at 1108 (2d Cir. 1992)* (citations omitted). "Mere cessation of conspiratorial activity is not enough" to satisfy this standard. *United States v. Nerlinger, 862 F.2d 967, 974 (2d Cir. 1988)*.

Rella contends that he withdrew from the conspiracy when he left the firm as its "in-house" investigator in 1984. However, Rella continued to work for the firm on an ad hoc basis thereafter. The parties' stipulation that there was no showing that any of the work performed by Rella after 1984 was tainted by illegality does not alter the significance of Rella's continued association [*269] with the Eisen firm. The District Court correctly found that the stipulation established, at most, Rella's "mere cessation" of illegal conduct, which [**66] was insufficient to prove his withdrawal from the conspiracy. See *id. at 974*.

Fishman contends that he affirmatively withdrew from the conspiracy before the effective date of the Guidelines by resigning his position at the Eisen firm in order to practice with another, independent law firm. Fishman

relies on this Court's decisioo in Nerlinger, in which the defendant participated in a conspiracy to defraud the customers of a brokerage firm. The defendant's role in the conspiracy was to open and maintain a bogus account with the firm for the purpose of diverting profits fraudulently obtained by his co-conspiratora. Id. We ruled that the defendant had withdrawn from the conspiracy before the conspiracy's termination by resigning from the brokerage firm and closing the account, reasoning that by doing so the defeodant had foreclosed the possibility of further participatioo in the conspiracy and relinquisbed any claim to subsequent profits. *Id. at 974-75.* However, in this case the District Court found that there was evidence that, after leaving the law firm, Fishman "cootinued to be entitled to a percentage of the recovery on all cases he tried [**67] including those giving rise to his pre-1985 racketeering acts."

Fishman argues that he received an annualized salary from the Eisen firm and was not entitled to a percentage of the recovery of the cases be tried. Stepben DiJoseph, a cooperating co-defeodant, testified that Fishman had told him that he was getting "a piece of the action on the cases he tried." Fishman faults the District Court for denying his request for a hearing oo this disputed sentencing factor. However, the District Court has broad discretion to determine the procedure by whicb it will resolve disputed issues at sentencing, so long as it affords the defendant some opportunity to rebut the Government's allegations. See *United States v. Prescott, 920 F.2d 139, 143-44 (2d Cir. 1990).* The District Court did oot abuse its discretion in denying the hearing and was oot clearly erroneous in concluding that Fishman failed to satisfy his burden of proving withdrawal from the conspiracy. n8

o8 The District Court also relied on another episode in determining that Fishman had oot withdrawn from the conspiracy. The District Court found that in February 1988, Fishman, together with defendant Weinstein, sought to convince DiJoseph to lie to investigatora in order to conceal his role in the Scbwartz fraud. Fishman argues that sucb an effort constituted a later agreement betweeo himself and Weinstein to conceal an earlier conspiracy and oot a cootinuatioo in, or rejoining of, the original conspiracy. Post-conspiracy acts of coocealment do oot, without more, extend the life of the conspiracy after its main objective has been attained. See *Grunewald v. United States, 353 U.S. 391, 399-402, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957); Krulewitch v. United States, 336 U.S. 440, 442-44, 93 L. Ed. 790, 69 S. Ct. 716 (1949).* Fishman, bowever, does oot dispute that the original conspiracy was oogoing in February 1988, when be made the statements in question. Because the District Court found that Fishman did oot effectively withdraw from the conspiracy wben be resigned from the Eisen firm, Fishman was still a member of the conspiracy at the time of these efforts, and, clearly, acts or statements designed to conceal an ongoing conspiracy are in furtherance of that conspiracy. See *United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1199* (2d Cir.), cert. denied, *493 U.S. 933, 110 S. Ct. 324, 107 L. Ed. 2d 314 (1989).*

[**68]

Conclusion

We have considered appellants' other arguments and find them to be without merit. The judgments of cooviction appealed from are all affirmed.

Automated Serial Permanent Charge-Out
FD-5a (1-5-94)

Date: 05/23/03 Time: 12:02

Case ID: 49A-DL-74944 Serial: 19

Description of Document:

Type : NEWSPAPE
Date : 08/27/98
To : DALLAS
From : MESQUITE TX
Topic: MESQUITE NEWS/ [redacted]

Reason for Permanent Charge-Out:

PLACED IN WRONG FILE

b6
b7C

Transferred to:

Case ID: 29B-DL-81697 Serial: 31

Employee: [redacted]

49A-DL-74944-19

Automated Serial Permanent Charge-Out
FD-5a (1-5-94)

Date: 11/18/98 Time: 16:11

Case ID: 49A-DL-74944 Serial: 20

Description of Document:

Type : NEWSPAPE
Date : 08/20/98
To : DALLAS
From : DALLAS
Topic: THE OBSERVER/NO ENERGY INVESTIGATION

Reason for Permanent Charge-Out:

MADE IN ERROR

Transferred to:

Case ID: 49A-DL-74944-NC Serial: 6

Employee: [redacted]

b6
b7C

74944-20

49A-DL-[redacted]

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 03/22/1999

Source, who is in a position to testify, provided the following information:

Source is an attorney licensed to practice law in the State of Texas.

Source was employed as an attorney for the law firm of BARON & BUDD from [redacted] Source advised that he/she left the firm in good standing following his/her receipt of a job offer from another asbestos litigation attorney.

Source was hired as [redacted] at BARON & BUDD. The [redacted]

After a case was filed, in addition to [redacted] a Product Identification (PID) para-legal, a medical para-legal, and an Interrogatory (ROG) para-legal would also be also be assigned to the case.

Source explained that product identification is the cornerstone of asbestos litigation. Cases and subsequent settlements hinge on the client's and/or his coworkers identification of the defendant's product. Source explained that essentially no records exist which detail what products were sold and subsequently used on any particular project. Successful settlements come from a diagnosed asbestos illness and a positive product identification.

b6
b7C
b7D

MJ 3/25/99

49A-DL-74944-21

Investigation on 7-21-98 at Dallas, Texas

File # 49A-DL-74944, [redacted] Date dictated 8-4-98

by SA [redacted]

ROBERT SAMUELSON

Asbestos burns legal system

Every law school should offer a course in legal ethics called "How Lawyers Abuse the Law." The first case study would be asbestos litigation, which shows how the thirst for profits has led a small group of trial lawyers to erode the rights of legitimate victims while driving dozens of companies into bankruptcy and — worst of all — corrupting the court system. If Congress doesn't fix the problem, shame on it.

Trial lawyers once did heroic work on asbestos. They forced old-line asbestos companies, which hadn't protected workers against known dangers, to compensate legitimate victims. Because asbestos had been widely used as insulation in shipbuilding and in construction, some companies couldn't survive. Johns Manville, the leading producer, went bankrupt in 1982.

But litigation was expected to decline because asbestos use dropped sharply. In 2001, asbestos use was only 3 percent of its 1973 peak. Instead, new claims have exploded. By 2000, they totaled 600,000 and were rising by about 50,000 a year, says the RAND Institute for Civil Justice, a think tank.

What happened? The answer is that claims are paid to people who aren't sick. Asbestos litigation has become less about justice and more about business. By shopping for favorable state courts, trial lawyers have turned asbestos into a cash cow. Asbestos claims already have cost $54 billion, RAND estimates. In the 1990s, victims got only 43 percent of the money. The rest went mainly to trial lawyers (who brought the cases) and defense lawyers (who fought them).

Projections of the ultimate costs now range from $200 billion to $275 billion. The final number of claimants is projected from 1 million to 3 million. Those estimates could be low, because all estimates so far have been low. As costs and claimants have grown, more companies have been sued; the total now is about 6,000. Many simply used some asbestos product.

The situation has become so absurd that even a few trial lawyers denounce it. Steven Kazan, who has represented cancer victims since 1974, recently testified before the Senate Judiciary Committee that the scorched-earth tactics of other trial lawyers have made it harder for genuine victims to recover. Payments to lots of undeserving claimants take away from people who actually die or from their families.

"We have gone from a medical model in which a doctor diagnoses an illness and the patient then hires a lawyer to an entrepreneurial model in which clients are recruited by lawyers who then file suit even when there is no real illness," Mr. Kazan testified. "They aren't patients. They are plaintiffs recruited for profit."

In theory, judges should prevent abuses. In practice, trial lawyers depend on a few states, whose expansive liability laws, procedural rules or well-known anti-corporate bias shifts the odds in their favor. The Association of Trial Lawyers of America reports that 85 percent of cases are filed in 10 states. Texas, Mississippi and West Virginia are leaders.

Among ordinary people, there is a word for this: fraud. It is a legalized fraud. Many people suffering no sickness are paid small sums so that a few trial lawyers can be paid large sums. The Association of Trial Lawyers of America estimates that 700 trial lawyers are engaged in asbestos litigation.

Congress could end this lavish welfare program for lawyers. It could pre-empt state law on asbestos; it could set strict medical standards for damages; it could put a cap on lawyers' fees. It could channel more money to deserving victims and reduce the total costs of asbestos settlements. It could limit this economic scourge and restore some self-respect to the law, which ought to be an instrument for social good and not lawyer enrichment.

Robert Samuelson writes for Newsweek.

49A-DL-74944-22

Inventory of Bulky Nonevidentiary Property
FD-192a (Rev. 2-12-02)

Date: May 27, 2003

Title and Character of Case
Baron & Budd
et al
Bankruptcy Fraud

File No.: 49A-DL-74944-IC3

OO: Dallas

Date Acquired	Acquired From:		
unknown	AUSA		
To Be Returned ☐ Yes ☑ No	See Serial	Acquiring Agent	Case Agent

b6
b7C

☐ Yes ☑ No Grand Jury Material - Disseminate Only Pursuant to Rule 6(e), Federal Rules of Criminal Procedure

☐ Yes ☑ No Property To Be Forfeited To The U.S. Government

Description of Property (Be Specific) IC1
2 card board boxes containing original documents produced by [redacted] attorney for Baron and Budd on behalf of Baron + Budd:

Box 1

Box 2

b6
b7C

49A-DL-74944-IC3

For Administrative Use:

Location of Property: _____

Control Number: _____

BLOCKSTAMP

DALLAS OBSERVER
MARCH 28 - APRIL 4, 2001

HOMEFRYIN'

with Fred Baron

DALLAS' LARGEST PLAINTIFF'S FIRM, BARON & BUDD, CULTIVATES FRIENDS, PUNISHES ENEMIES AND BEATS ALLEGATIONS IT PROMPTS CLIENTS TO LIE AND WIN

By Thomas Korosec

Perhaps you remember this cheating scandal.

Three and half years ago, a junior lawyer from Dallas-based Baron & Budd accidentally handed an opposing lawyer an internal memo that appeared to coach clients to lie about central facts in asbestos liability cases.

"With this document, you could almost go down the street, get a homeless person, spend a couple hours with him, and he would be prepared to testify," Eugene Cook, a former Texas Supreme Court justice, said then. Low opinions of lawyers are fueled by these kinds of revelations, Cook testified in San Antonio. "The public thinks, 'The lawyers are doing it again. They're subverting the truth.'"

In Baron & Budd's high-volume legal assembly line, the so-called script memo was used to prepare more than 200 clients in their lawsuits against large manufacturing companies and others that sold or used products containing the cancer-causing substance before it was banned in the 1970s. The 20-page memo instructed these mostly elderly workers never to testify that they saw warning labels on asbestos packages or knew it was dangerous and gave firm directions on how to testify about their exposure to asbestos products in ways to make their cases better.

As a handful of lawyers for those companies pushed in civil courts to investigate the memo and its use, and a judge in Dallas initiated a criminal investigation, firm founder Fred Baron offered a variety of defenses and explanations. The memo was

Fred Baron, founder of the 70-lawyer firm that bears his name, made his fortune suing asbestos makers. He protects the firm with a combination of no-holds-barred lawyering and political savvy.

the work of a rogue paralegal and unknown to lawyers at the firm: It was not encouragement to lie because a lawyer has a duty to "refresh" a client's memory. It was a breach of the attorney-client privilege to even question the memo. At one point, the firm offered a legal affidavit concluding that whatever its behavior, it is not against the law in Texas to suborn perjury.

If anything was amiss, and Baron insisted it was not, the combative lawyer assured reporters in early 1998 that he had hired two legal-ethics experts from his alma mater, the University of Texas Law School, to set things right.

Somehow, the ethics team missed visiting Ken Treuter's desk.

For six months, until sometime in August 1998, the former private investigator was one of approximately 400 paralegals and clerks who assist the firm's 70 lawyers in moving tens of thousands of asbestos claims through the courts.

"They had so many of us in there they were setting up card tables," Treuter says of the firm's home office in Oak Lawn. "The printers would be backed up continuously; there were piles of papers stacked up for the data-entry folks."

In his $16-an-hour temp job, Treuter says he was assigned to find witnesses who could support claims by Baron & Budd plaintiffs that they were exposed to asbestos products at various workplaces from the early 1940s until the late 1960s.

The problem was, almost nobody could remember these facts without being told what to say, Treuter recalled in an interview earlier this month. It was his job to get them to name 20 or 30 different products from the multiple companies Baron & Budd would typically sue. (Baron has said the firm keeps a database on what asbestos products were used at various workplaces. The firm urges its clients to remember hazardous products it can prove were used where they worked.)

To find his would-be witnesses, Treuter says he would place ads in newspapers from Seattle to San Diego, which was his assigned region, and ask people to call if they worked at a particular company in the past. The workplaces included construction sites, government buildings, brake shops and lumber mills. He would locate further witnesses from company picnic photos and other enterprising sources.

"Realistically, would you remember the name on a bag of something you opened up 40 years ago?" Treuter asks, explaining the challenge he faced in getting the answers the firm sought.

The men he'd deal with were typically in their 60s or older, with little education and a lifetime of blue-collar work behind them, he says. Treuter, who spent 23 years as a licensed investigator doing street-level criminal investigations, says he used his good ol' boy nature to work his subject with stories of corporate malfeasance or whip up sympathy for victims of asbestos disease. "I'd tell 'em these companies knew this stuff was deadly. Guys would take it home on their clothes for their wives to wash. I'd evangelize."

Treuter says he was pretty good at his job, and he'd usually end up getting many men to say many things they had no idea about before he called. "I'd get 'em to identify every one," he says of his list of 20 or more products. Clerical staff managers and a "product ID" paralegal he worked under taught him his techniques.

"My training was focused on being more aggressive, more convincing, more persuasive and be insistent that they [witnesses] worked with so and so, and they were exposed to so and so," Treuter says.

Truth got lost in the process, he says, and Treuter recalls being uncomfortable from the start with telling witnesses how to testify. "What I was doing was fraudulent. There was never any doubt in my mind about it."

In August 1998, the *Dallas Observer* published a lengthy story in which a former attorney and three former paralegals gave similar accounts to the one Treuter gives now. The paper published documents suggesting improper witness-coaching was not an isolated incident at Dallas' largest plaintiff's firm and that lawyers there also were involved in implanting memories and inventing testimony. Training session notes taken by one lawyer, for example, read, "Warn [plaintiff] not to say you were around it—even if you were—after you knew it was dangerous."

Soon afterward, though, the matter seemed to die. Foes dropped away. Lawsuits withered. Criminal investigations begun by the county and the feds went nowhere.

Baron declared himself vindicated and moved into his new, 15,000-square-foot Preston Hollow estate. Last year, he assumed the presidency of the Association of Trial Lawyers of America and moved to Washington, D.C., where he'll try to influence policy on issues such as HMO and asbestos lawsuits and tort reform.

So how did Baron & Budd escape this embarrassing glimpse at the internal workings of the firm so cleanly? Why did several large corporations, judges, prosecutors and others let the matter drop?

While legal issues such as witness coaching are hardly clear-cut, critics wonder whether Baron & Budd's perfectly legal campaign contributions might have played a role in getting it off the hook.

Former U.S. Attorney Paul Coggins told the *Observer* recently he recused himself from participating in his office's investigation of the memo because of a conflict of interest posed by the firm's political contributions to his wife, Regina Montoya Coggins, in her run last year for Congress. He said contributions to his wife from the national trial lawyers group, where Baron earlier served as vice president, also drove his decision to remove himself from making decisions in the case.

Baron's critics question how vigorously Coggins' troops pursued Baron & Budd without support from the top, and whether Baron's massive fund raising for the Democrats, which stepped up in early 1998, might

"WHAT I WAS DOING WAS FRAUDULENT. THERE WAS NEVER ANY DOUBT IN MY MIND ABOUT IT."

have influenced Coggins' superiors in Washington as well. "In my humble opinion," says one lawyer who provided information to the FBI, "that investigation was a joke."

In the past four years, Baron's firm gave $584,000 in soft money to the Democrats, according to the nonpartisan Center for Responsive Government, not counting several $10,000 donations to President Clinton's legal defense fund. Before the last two elections, Baron and his wife, Lisa Blue, hosted two $25,000-a-couple fund-raisers with Clinton at the couple's houses in Dallas and Aspen.

Concerns about influence, though, are speculative. Acting U.S. Attorney Richard Stephens, who Coggins said was in charge of the investigation, declined to comment on the case, which another knowledgeable source says has been closed.

More tangible reasons the matter died can be found in the firm's hard-nosed legal tactics, the zeal it took in punishing those who took the firm on, and the message sent to anyone who might do the same.

"I've never seen anything like them in my 17 years of practice," says Elizabeth Pfifer, one of three defense lawyers who challenged the firm over the memo. "Everyone understood that if we took them on, they would go after our clients."

She said she just didn't realize how effective Baron's firm could be or that the lawyers themselves would be made to pay.

To a degree many say puts Baron & Budd in its own league, the firm went after those who took issue with the memo. Targets included Bill Skepnek, a lawyer who tried to get the firm booted from representing asbestos clients in Dallas, and state District Judge John Marshall, who called the firm's coaching tactics "an affront to the integrity of the judicial system." He is the one who referred the script memo to criminal authorities.

When one side of a legal dispute gets slammed because the other has cultivated a friendly climate in its hometown, the lawyers have a name

for it: homefrying. Baron's detractors say he and his firm are as adept as anyone at turning up the heat in Dallas, and it has served him well as he has defended himself in the memo flap.

For the last two years, G-I Holdings Inc. (formerly GAF Corp.), a company in Wayne, New Jersey, that owns the stock of the nation's largest maker of roof shingles, has been sniffing around Dallas, trying to talk to former Baron & Budd lawyers and paralegals about the way the firm prepares its clients.

It hasn't had an easy time. In 1999 and again earlier this year, Baron & Budd caught wind of G-I's attempts and persuaded Dallas judges to order the company's investigations shut down.

The company, which earlier this year filed for Chapter 11 bankruptcy protection, citing a number of new asbestos claims, sued Baron & Budd and two other firms in January, accusing them of racketeering for bringing an avalanche of meritless asbestos claims. The suit, which included numerous refetences to the coaching memo, accused the firms of using a highly systemized method of recruiting and coaching plaintiffs and flooding the courts with hundreds of thousands of asbestos claims.

"Having largely exhausted the supply of plaintiffs who actually became sick as the result of prolonged exposure to asbestos," the suits allege, the firms "increasingly solicited non-sick claimants who can allege, merely, that they were exposed to asbestos at some point in time." As a result, 25 once-profitable companies have been driven into bankruptcy, despite paying tens of billions of dollars to settle 300,000 cases to date.

Baron, who responded to one question for this story and declined to comment further, says G-I's suit is a tit-for-tat move in a "very, very difficult war" with the company and its chairman and owner, Samuel Heyman. "They want to throw us off the creditor's committee and screw all of our clients," Baron says, referring to the company's bankruptcy. "Sam Heyman is a very bad guy."

"We won't even dignify that with a response," says Richard Weinberg, chief executive officer for G-I.

Weinberg says the racketeering suit grew out of a system of handling asbestos lawsuits in state courts that works very well for plaintiffs' lawyers but miserably for defendants, and in turn, asbestos victims who are demonstrably ill. In his experience, plaintiffs' lawyers will negotiate to settle cases for sick plaintiffs—those with asbestos-related cancers, for instance—by demanding $3,000 apiece for their huge inventory of cases from clients who show no ill-health effects, he says. In other words, they leverage a few strong cases against masses of weak cases that are too numerous to defend. Within the past year, companies such as vinyl floormaker Armstrong and Owens-Corning, the nation's top maker of fiberglass insulation, have been driven into bankruptcy because of an ever-increasing volume of claims from workers who are not sick. And in bankruptcy, five or six years typically go by before anyone is paid, Weinberg says.

Former state District Judge John Marshall took issue with Baron & Budd's methods. He says the firm's political muscle was enough to boot him from the bench.

"We understand, as part of the industry, we have liability," Weinberg says. In 1967, his company acquired Ruberoid Co., which from the mid-1940s to the 1960s produced asbestos insulation. It made about $1 million in profits from its asbestos business, according to the lawsuit. G-I has paid $1.5 billion in asbestos lawsuits, about half of which went to attorneys' fees, it says.

To pursue its allegations that Baron & Budd has suborned perjury and fabricated evidence to produce dubious cases, G-I dispatched investigators to Dallas in 1999. Baron & Budd met them head-on. The firm obtained a temporary injunction from state District Judge Merrill Hartman, forbidding them from "communicating in any manner" with former Baron & Budd employees. Such information was likely "privileged and confidential," Hartman ruled.

Over the next year and a half, the battle over the investigators became bogged down in a series of appeals and counter-appeals that at one point occupied the services of eight lawyers at five law firms. It was still going on in January, when the company filed for bankruptcy.

Baron & Budd has consistently argued that talking to former employees about witness coaching violates the principle that communications between lawyers and their clients are confidential—the so-called attorney-client privilege. The day the script memo was accidentally handed over in Corpus Christi in 1997, lawyers from the two

While former U.S. Attorney Paul Coggins' office was investigating Baron & Budd, the firm was passing the plate for his wife's campaign.

sides at one point literally grabbed opposite ends of the document in a fracas by a copy machine while the Baron & Budd lawyer argued that point. For the next six months, the legal question became whether the memo was evidence of fraud and thus not protected by the privilege. District judges in Austin and San Antonio found the memo was not protected, but two lower-level appeals courts overturned those rulings, one in a split opinion. The matter was dropped before it reached the Texas Supreme Court.

This January, after filing its racketeering lawsuit, G-1 employed a new set of investigators, Kroll & Associates, and by the end of the month, they were busy tracking down former employees. On January 30, they telephoned former Baron & Budd lawyer Amy Blumenthal, who in turn telephoned her former firm, which appears to have gone immediately on alert.

The same day, Dallas City Councilwoman Laura Miller, whose husband, state Rep. Steve Wolens, is a partner at Baron & Budd, called *Observer* Editor Julie Lyons to inquire if Kroll had contacted the newspaper, which in 1998 posted witness-coaching documents on its Web site. "She said Fred asked her to call," Lyons says of Miller, a former columnist for the paper. "She wanted to know if Kroll had called us."

The next day, state District Judge Ann Ashby granted Baron & Budd's quickly drafted motion for a temporary restraining order. It barred Kroll from contacting the firm's employees and ordered Kroll's investigators to submit themselves to questioning by Baron & Budd about what they had learned.

Ashby declined to comment on her ruling.

In New York, G-1's lawyers were apoplectic. They complained to the federal judge overseeing the racketeering case that they had been, so to speak, homefried. They accused Baron & Budd of using a state court in its "home county" to "protect" the firm. The aim, they said, was to halt the company's inquiry "virtually as soon as it began."

"I'M NOT VERY WILLING TO JUMP OUT THERE AGAIN. I NEVER BELIEVED BARON COULD HAVE DONE WHAT HE DID."

After another round of legal maneuvering in which Ashby gave the firm a second restraining order, U.S. District Judge Robert Sweet, who is presiding over the racketeering case in New York, stepped in to resolve the matter. A hearing is scheduled next month. For his defense in the racketeering case, Baron has hired Abbe Lowell, the Washington lawyer who pleaded the case for President Clinton during impeachment proceedings in the House.

The last judge in Dallas to rule that the firm deserved further scrutiny, not protection, was Marshall. At a hearing in February 1998, he said the memo's "encouragement to fanciful testimony is unmistakable...It is time for the maneuvering and word-smithing to come to an end." He referred the case to the Dallas County district attorney for criminal investigation.

After the hearing, within earshot of reporters, Baron called Marshall a "fruitcake." He told Skepnek, one of the lawyers pressing the case against the firm, "You've got a bull's eye on your back."

Marshall, a lifelong Republican who drew no opponents when he ran in 1992 and 1996, found himself the next year in the fight of his life, with Baron leading the charge. Before the 2000 primary, Baron urged a Dallas trial lawyers group to target the judge with campaign money, enlisting the firm's lawyers in his cause. Campaign records show Baron & Budd was an early donor to Marshall's opponent, Mary Murphy, who said Baron was one of the first to urge her to run.

Marshall lost, and he makes no secret that he views his defeat as a result of his rulings and criticism of Baron & Budd. The firm has political money and, hence, power, he says. "You are talking enormous sums of money, and there are only a handful of people in the world who can't be bought," Marshall says. "You see the articles about his big fund raising [for the Democrats]. You put that kind of money in the pocket of a president and that's intimidating to some people."

Several lawyers interviewed for this story said Marshall's defeat sent a signal that it's hazardous to threaten Baron & Budd. "If I liked my comfortable seat on the bench, I'd think twice about ruling against them on these things," says one attorney, who declined to be named. Says another who was close to the memo case, "No judge in Dallas will cross Baron & Budd after what happened in that election. They are scared to death."

Marshall isn't the only one complaining he was run over once he took his shot. Consider the case of Skepnek, a career plaintiff's lawyer from Lawrence, Kansas, who pushed to have Baron & Budd removed from its cases because, he argued, it suborned perjury.

In the fall of 1997, Skepnek, Pfifer and Robert Thackston, an attorney with Jenkens & Gilchrist, were out front leading the memo attack. Skepnek represented Raymark Corp; Pfifer was outside counsel for Borg-Warner Corp., and Thackston handled asbestos defense for W.R. Grace and Co.

After the three lawyers took the offensive, Baron & Budd stepped up asbestos litigation against clients, Pfifer says. Grace and Borg-Warner soon negotiated settlements that took them out of the fray.

That left Raymark Corp., which had hired Skepnek because of his success in bringing a malpractice suit against a wealthy and influential Houston plaintiff's firm. He represented 46 workers who said their lawyers sold them short in a multimillion-dollar case in a chemical plant explosion. Skepnek's nerve was obvious. The state Bar had cleared the workers' lawyers. No lawyer in Houston would take the case.

In April 1998, though, Raymark filed for bankruptcy and Skepnek lost his client. There was no one left to press forward on the memo or the pending appeals. No one ever deposed the paralegal, her immediate supervisors or the clients who supposedly were prepared with the memo to testify.

And within months, Baron & Budd turned the tables on Skepnek. It filed contempt motions against him in 165 courts across Texas alleging he had knowingly produced a perjured affidavit by a Raymark official about the extent of its business in Texas. Skepnek, left to hire his own lawyer, was eventually fined $150,000 but has whittled that down to $30,000 after appeals. He narrowly escaped the firm's effort in a Dallas court to put him in jail.

"I'm not very willing to jump out there again," Skepnek says, declining to comment extensively for this story. "I never believed Baron could have done what he did."

As part of its counterattack, the firm tied up Skepnek's legal fees from Raymark in a contentious bankruptcy fight that itself has spawned a crop of lawsuits. In the latest, filed in November in Connecticut, former Raymark executive Craig Smith sued Baron for libel for calling him "a low-down dirty crook" last June in *The New York Times*. Smith, who is now running a business in Wales, is seeking $400,000 in damages.

Skepnek took nearly as much offense—although he has not filed suit—at how he was portrayed by Charles Silver, a University of Texas Law School legal-ethics professor, in a law review article published in late 1999.

The article defended the Baron & Budd's script memo as merely "poorly written," and turned to a lengthy discussion of Skepnek's affidavits, taking issue with him by name.

Silver concluded that the media's interest in Baron & Budd, rather than Skepnek, was the outgrowth of a "propaganda war" financed by "well-organized, well-funded, smart and highly motivated" opponents of trial lawyers.

The professor's piece, however, failed to mention that Baron & Budd hired him to write an affidavit used in its coaching-memo defense. In it he argued that the firm "did more than duty required" when it stopped using the script document, which he called "awkward or clumsy rather than an effort to perpetrate a fraud."

Silver, who testified recently in California in favor of multimillion-dollar trial lawyers' fees, was one of the two ethics experts Baron says he retained to school his firm in ethics in 1998. He did not return several calls for comment.

As crusaders against special-interest money in the state's elected judiciary, the left-leaning Texans for Public Justice is usually concerned about wealthy defense firms and their big-business clients. "They're the ones who can afford to seek influence," says Chris Feldman, staff attorney for the Austin-based group.

So he was a little surprised to learn last month that a drive by lawyers to hire and pay a lobbyist for appeals court judges in Dallas and Houston was initiated by a trial lawyer, state Rep. Wolens, from Baron & Budd.

Linda Thomas, chief justice for the 5th District Court of Appeals in Dallas, says she has been frustrated with inadequate funding for her court. When she raised the issue with Wolens, he came up with the idea of passing the hat to law firms in Dallas and Houston to hire someone to push her cause in the Legislature. Thomas says she didn't consider the favor unethical.

Wolens says his intent was to help the Dallas court overcome a funding disparity, just as he would help other local institutions that receive state money. "I know what a bear it is getting this done," he says. He says he had no intent to cultivate favor with the court, which he personally has appeared before only once.

"IF I LIKED MY COMFORTABLE SEAT ON THE BENCH, I'D THINK TWICE ABOUT RULING AGAINST THEM."

"I don't care who it is," Feldman says. "It's unethical when you raise money for the courts. You have firms that max out [under the state's $5,000 limit on judicial campaign contributions], so they look for other ways to curry favor. It sure gives an appearance of impropriety."

In Dallas, several lawyers say, Baron & Budd often seems to lend a hand in ways that are legal but extraordinary.

In 1995, Baron's wife, Lisa Blue, one of the firm's top courtroom lawyers, led a drive to buy every civil judge in the county a new personal computer. Her firm provided much of the $200,000 needed for the 39 machines, according to one glowing report of the donation. "I feel a personal obligation to do this because of my asbestos cases," Blue told *The Dallas Morning News*. "I know I've created work for them."

As it turns out, two of the judges who received computers made critical rulings in the firm's favor in the memo disputes.

Beyond that, in October 1997, Justice Thomas overturned Judge Marshall's ruling to halt all local Baron & Budd's asbestos cases. Her emergency stay within hours after his ruling stunned opponents and represented a major win for the firm.

Interestingly, the next step in Baron & Budd's current dispute with G-I over its investigators would be in Justice Thomas' court.

"They're richer than the Catholic Church," Pfifer says of the firm. "They're very well-wired."

In his labors at Baron & Budd, paralegal Treuter says he would at times be given rush jobs that took him out of his daily, witness-finding duties.

As the firm reached mass settlements with manufacturers, it needed to produce sworn affidavits from every client who had sued, he recalls. The mostly retired workers had to swear they had been exposed, 30, 40 or 50 years ago, to specific products the company made. Industry officials say they require the statements to validate claims and present them to insurers.

"At one point they needed to catch up on 800 of them," says Treuter, and any spare person in his department, which numbered about 20, would be put on the job.

Treuter says some clients had already identified the products in prior talks with the firm, and sometimes they had not.

Frequently, he says, he was the first person to mention the products, and clients who didn't remember them were hesitant and worried about signing. "They'd ask, 'Do I have to go court? Do I have to come to Dallas?'"

Treuter says he would assure them all they had to do was sign the document, have it notarized, send it in, and money would be coming their way.

"It was like telephone marketing...a marketing approach," Treuter says. But it didn't take much savvy to close the sale. Everyone would sign, he says. "When you are offering someone the ability to get money in their pocket when they're not expecting money for any particular reason, it's not all that difficult."

U.S. Department of Justice

United States Attorney
Northern District of Texas

1100 Commerce St., 3rd Fl.
Dallas, Texas 75242-1699

Telephone (214)659-8600
Fax (214)659-8805

July 22, 2000

[redacted]
Supervisory Special Agent
Federal Bureau of Investigation
1801 N. Lamar, Suite 300
Dallas, Texas 75202

Re: Investigation of Barron & Budd law firm

Dear SSA [redacted]:

Because of the administrative nightmare created by the McDade legislation, we have closed our investigation into the above-captioned matter.

Sincerely,

Paul E. Coggins
United States Attorney

[redacted]
Assistant U.S. Attorney

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b7C

49A-DL-74944-24

[redacted]

(Rev. 01-31-2003)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 05/27/2003

To: Dallas

From: Dallas
WCC1
Contact SA [redacted]

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b7C

Approved By: [redacted]

Drafted By: [redacted]

Case ID #: 49A-DL-74944 (Pending)

Title: BARON & BUDD;
ET AL;
BANKRUPTCY FRAUD;

Synopsis: To close captioned matter.

Details: Captioned matter was initiated upon a referral from a BARON & BUDD employee who alleged that the law firm of BARON & BUDD engaged in an ongoing practice of falsifying claims to bankrupcty trusts on behalf of clients the firm represented.

The employee alleged that BARON & BUDD knowingly withheld information which would reflect that the client's cause of death was other than asbestos related. The information was referred to the Office of the United States Attorney, Northern District of Texas, who agreed to prosecute should the allegations be verified.

BARON & BUDD is considered one of the largest asbestos litigation law firms in the United States. The nature of its practice is large class action lsw suits against the manufacturers, and/or the subsequent estate when the company is forced to file bankruptcy, of asbestos products.

Due to FRED BARON's significant influence within the Democratic Party, then United States Attorney Paul Coggins, recused himself from the investigation.

Numerous documents in this case were collected, via voluntary producation or subpoena, and the investigation was progressing slowly.

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On July 22, 2000, in a letter to SSA [redacted] Assistant United States Attorney [redacted] closed the

C4
5/28/03

49A-DL-74944-25

investigation citing administrative problems associated with the McDade legislation.

Although the investigation was closed by the United States Attorney's Office, the captioned FBI file remained open due to the fact that SA [redacted] was in possession of numerous records which needed to be returned and/or transferred from evidence to the 1A section of the file. Due to higher investigative priorities, this project was not completed in a timely manner, and has only recently been accomplished. b6 b7C

As all evidence has been placed in the 1A or 1C section of the file, it is requested that this matter, and all associated subfiles be closed

♦♦

Closed

The Great Asbestos Swindle

By Lester Brickman

"Issue one" for the new Congress should be the rescue of the U.S. economy from a lethal threat invisible to most Americans.

While the public expresses justifiable outrage over corporate corruption, another fraudulent enterprise is flying beneath radar screens—one that has already cost investors and employees with 401(k) plans more than the Enron debacle, drained the economy, and killed thousands of jobs. Asbestos lawsuits—now expected to cost the U.S. economy more than $200 billion—will one day undoubtedly take a place in the pantheon of great American swindles, next to the Yazoo land frauds, Credit Mobilier and Teapot Dome.

Ninety thousand new asbestos claims were filed last year—triple the number filed two years ago. The explosion came two decades ago when plaintiffs' lawyers were forced to retarget their litigation as first the leading defendant, and then other defendants, went bankrupt. Like the proverbial frog in a pot brought to a slow boil, courts grew increasingly comfortable with the uncritical acceptance of radical changes in claimants' testimony about product exposure.

Courts did their share to directly further asbestos litigation by developing a "special asbestos law"—allowing seriously injured plaintiffs to prevail, without having to prove causation under standard tort-law principles. Making matters worse, the law is now not only applied to cases of dubious injury, but to cases with no injury.

For plaintiff lawyers, this development was like the discovery of gold at Sutter Creek. But these hordes of prospecting lawyers soon ran into a wall—the actual numbers of sick people. At the rate of 4,000 malignancy claims a year, it would take too long to accommodate the pecuniary interests of tort lawyers. The universe of claimants had to be expanded.

Presto: tens of thousands of claimants who were neither sick nor impaired but who won the asbestos lottery when mass x-ray screenings showed collagen deposits—benign lung abnormalities related to many environmental causes—were signed up. The claimants were then given scripts with blatant falsehoods to memorize and repeat in sworn testimony. For practical purposes, the supply of such plaintiffs claiming workplace exposure to asbestos but no injury is essentially infinite. Asbestos litigation will go on until the last dollar is extracted from an ever-widening group of defendants.

Asbestos litigation today has come to consist, mainly, of unimpaired people reaping compensation at the expense of the genuinely injured, on the basis of prepared scripts with perjurious contents, backed by bogus medical evidence. Even though most asbestos cases today are risk free, especially when settled in huge batches, lawyers' effective rates run from $5,000 to $25,000 an hour.

Rampant fraud in asbestos litigation calls for a prosecutorial response. But so far, no prosecutor has been willing to take on the high-rolling lawyers. In the meantime, Congress should legislatively limit fraudulent claiming. Those with no illness or impairment should not be able to destroy entire companies, wiping out shareholder value, employees' 401(k) plans and thousands of jobs.

Mr. Brickman is a professor of the Benjamin N. Cardozo School of Law in New York.

Wall Street Journal

49A-DL-74944-26

[redacted]

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b7C

AO 110 (Rev. 12/89) Subpoena to Testify Before Grand Jury

United States District Court

NORTHERN DISTRICT OF TEXAS AT DALLAS

TO:

b3
b6
b7C

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:

[X] PERSON [X] DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
	DATE AND TIME

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

~~49A-DL-74944-2~~
49A-DL-74944-Sub2

b3
b6
b7C

☐ *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK	DATE
(BY) DEPUTY CLERK	

This subpoena is issued on application of the United States of America

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

Assistant U.S. Attorney
1100 Commerce Street, Third Floor
Dallas, Texas 75242

*If not applicable, enter "none"

AO 110 (Rev. 12/89) Subpoena to Testify Before Grand Jury

RETURN OF SERVICE [1]

RECEIVED BY SERVER	DATE	PLACE Dallas, Texas
SERVED	DATE	PLACE Dallas, Texas

SERVED ON (PRINT NAME)

SERVED BY (PRINT NAME)	TITLE Special Agent - FBI

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL
—	—	—

b3
b6
b7C

DECLARATION OF SERVER [2]

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ (Date) _____ (Signature)

1601 N. Lamar, Suite 300
Dallas, Tx 75202
Address of Server

Additional Information

[1] As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

[2] "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 U.S.C. 1825, Rule 17(b) Federal Rules of Criminal Procedure)."

AO 110 (Rev. 12/89) Subpoena to Testify Before Grand Jury

United States District Court

NORTHERN DISTRICT OF TEXAS AT DALLAS

TO: [redacted]

b3
b6
b7C

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:

☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE [redacted]

COURTROOM [redacted]

DATE AND TIME [redacted]

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

(F)

49A-DL-74944-Sub Sbp-3 Sbp-

☐ *Please see additional information on reverse*

[redacted]

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK [redacted]

DATE [redacted]

[redacted]

b3
b6
b7C

This subpoena is issued on application of the United States of America.

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

[redacted]

Assistant United States Attorney
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699

[redacted]

*If not applicable, enter none

4/21/03

K/ER

AO 110 (Rev. 12/89) Subpoena to Testify Before Grand Jury

PROOF OF SERVICE[1]

RECEIVED BY SERVER	DATE	PLACE Dallas, Tx
SERVED	DATE	PLACE Dallas Tx

SERVED ON (PRINT NAME)

by fax and US mail as agreed

SERVED BY (PRINT NAME)	TITLE Special Agent FBI

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

b3
b6
b7C

DECLARATION OF SERVER[2]

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ (Date) _____ (Signature)

[redacted]
Address of Server

Additional Information

1 As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

2 "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure: Rule 17(d), Federal Rules of Criminal Procedure), or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)".

FD-350 (Rev. 5-8-81)

(Mount Clipping in Space Below)

(Indicate page, name of newspaper, city and state.)
Dallas Morning News
Dallas, Tx
Date: September 28, 1997
Edition:
Sunday
Title: Law firms memo in asbestos lawsuit sparks ethics debate
Character:
or
Classification: 49A-DL-74944
Submitting Office:
Bankruptcy Fraud
Indexing:

Law firm's memo in asbestos lawsuit sparks ethics debate

Baron & Budd founder says papers to prepare witnesses are appropriate

By Tim Wyatt
Staff Writer of The Dallas Morning News

An internal document from a Dallas law firm has triggered questions about the firm's ethics and the credibility of millions of dollars in asbestos damage claims throughout the country.

Defense attorneys for asbestos manufacturers claim in court records that a 20-page memorandum circulated

■ Excerpts of document. 14A

by the Baron & Budd law firm to clients before they testify is designed to "create evidence that would perpetuate a fraud."

Last week, Dallas State District Judge John McClellan Marshall referred the issue to a State Bar of Texas grievance committee to determine if the firm violated ethics rules.

Fred Baron, founder of the firm, told a San Antonio judge on Sept. 18 that he had been unaware of the witness-preparation document, but legal experts have since examined it and found it "perfectly appropriate...

Please see WITNESS on Page 14A.

BY DL
W/ TEXT ✓
W/O TEXT
Wyatt

49A-DL-74944-9
49A-DL-74944-NC-2

b6
b7C

FBI/DOJ

Witness-preparation document in asbestos lawsuit triggers debate

Continued from Page 1A.

there has been absolutely no foul committed here."

Bob Greenberg, who represents the Dallas law firm, one of the top toxic tort firms in the nation, said the controversy is a defense tactic.

"This is nothing more nor less than an attack by the defendants to keep [Baron & Budd] asbestos cases from coming to trial," Mr. Greenberg said.

The memorandum, according to a defense lawyer in an Ohio asbestos case filed by Baron & Budd, is a "psychological masterpiece."

"Step by step, it leads the client to the conclusion that in order to win money, the client must be free with his answers and in disregard of the truth," said Tom Riley, a Cedar Rapids, Iowa, attorney for Raymark Industries. "It tells how to lie. Do it with confidence. The more confident you are, the more money you'll get."

At stake are thousands of claims by Baron & Budd clients who contend that they have been injured by exposure to products that contained asbestos, a fibrous substance known to cause cancer and other health problems.

Hundreds of millions of dollars in judgments and awards have been paid out nationally as a result of the contentious mass litigation, which has forced some of the largest asbestos manufacturers into bankruptcy. Last year, according to Mealey's Litigation Reports, Owens-Corning alone paid out $267 million in damages and defense costs. The company said it expects to pay out $300 million this year.

The document, titled *Preparing for Your Deposition*, contains detailed lists of products that contained asbestos, along with descriptions of their packaging, and a list of asbestos-related health symptoms that could enhance legal damages.

In one portion of the guidelines, the client is told: "You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!"

Another portion of the document states: "If there is a MISTAKE on your Work History Sheets, explain that the 'girl from Baron & Budd' must have misunderstood what you told her when she wrote it down."

The document surfaced Aug. 27 when one of Baron & Budd's asbestos claimants referred to it during his sworn deposition in Corpus Christi. The document was among others that were made available to defense attorneys who filed it as an exhibit a week later. Within days, the memorandum began appearing in courtrooms from San Antonio to Cincinnati.

Over the last two weeks, Baron & Budd attorneys have appeared in at least six courts in Texas and Ohio, arguing that the document is a confidential memorandum protected by attorney-client privilege and, even so, relates only to the Corpus Christi case.

Defense attorneys are asking the courts to suspend Baron & Budd cases until they can determine if the document has influenced testimony in cases against them.

"We can't have lawyers teaching their clients how to commit crimes or fraud," said William J. Skepnek, a Lawrence, Kan., attorney who also represents Raymark Industries.

Robert Thackston, an attorney for W.R. Grace & Co., another frequent asbestos defendant, said in a San Antonio hearing that Baron & Budd's document "substitutes the law firm's story for what the [client's] story might have been."

"It reflects a process that we have suspected was going on for years, based on the uncanny depositions we get," Mr. Thackston said.

Mr. Baron, arguing in that same hearing, said, "I believe that the uniform opinion among the ethics experts is that the document is indeed appropriate."

William Hodes of the Indiana University School of Law-Indianapolis, who reviewed the document at the request of *The Dallas Morning News*, said plaintiffs' lawyers have to prepare their clients for what to expect in testimony.

"Is it improper? There are parts of it that are quite troubling," Professor Hodes said. "But overall, I don't see much of a problem."

John Corkery, who teaches ethics at the John Marshall School of Law in Chicago, said the memo is an unethical legal ploy called "I'll tell you the law and you tell me the facts."

"And the law is, 'If you were real close to this asbestos stuff and if you can remember the names on the bags, you've got a case, and if you can't, you don't. So, now tell me the facts, did you remember or not? Were you close or not?' "

Judge Marshall, one of the judges hearing the controversy over the last two weeks, told lawyers in his Dallas courtroom: "The one thing that we should all tell all of our clients, which is notable in its absence in this 20-page document, is . . . tell the truth."

Mr. Riley, whose client, Raymark, was once forced into bankruptcy by asbestos litigation, said the document "speaks for itself."

"And what it speaks of is fraud," he said during an Ohio hearing. "(N)ot just on this court, but on courts throughout the land, and presumably in litigation that spans decades."

Steve Wolens, a Dallas state legis-

EXCERPTS OF WITNESS PREPARATION DOCUMENT

The following ara axcarpts from a document distributed by the Beron & Budd law firm to clients befora thay testified about their claims againsl esbestos manufacturars. Baron & Budd attomeys said the document "is entirely appropriate." Robert Thackston, an attomey represanting W.R. Grace & Co., a defendant, said, "We call that perjury."

Here are selected axcerpts, with the firm's own amphasis, from the 20-page document titled *Preparing for Your Deposition*:

"You will be asked WHY you think you have a case against the manuiacturars oi asbestos products. You ara suing the asbestos manuiacturars becausa they MADE a produci they KNEW was harmful and they CONCEALED that danger from the public."

■

"You will be asked if you ever saw any WARNING labels on containers of asbestos. It is important to maintain that you NEVER saw any labels on asbastos products that said WARNING or DANGER."

■

"Lat's say a dafansa attomay asks you to dascriba joint compound, what it looked lika, what kind oi packaga it cama in and how it was appliad. You give your description, to the besl of your abiiity. Then he asks you to nama all tha joint compound names you can racall. You name ona or two, but can't remembar tha rast. If he than asks you if you recall the name 'TRIKO' and asks you what typa oi product 'TRIKO' was, you can bet it was joint compound! . . . So you can ba confident in saying 'TRIKO' was joint compound. . . ."

■

"You may be asked how you are able to recall so many product names. The besl answer is to say that you recall seeing the namas on tha conteiners or on the product iiself. The mora you thought about it, tha more you remambered! If the defanse attomay asks you if you wara shown picturas of tha products, wait for your attomay to advisa you to answer, than say that a girl from Baron & Budd showad you picturas oi MANY products, and you pickad out the ones you remembarad.

"If there is a MISTAKE on your Work History Shaats, oxplain that the 'girl from Baron & Budd' must hava misunderstood what you told her when she wrote it down."

The Dallas Morning News

letor and a Baron & Budd partner, told the court neither he nor other members of the firm's team responsible for Ohio litigation hed ever seen tha memorandum.

"f waa shocked to see it, with many aspects that were in it," Mr. Wolens said. "There were some espects that I wes not surprised at, but some that f was."

While Mr. Riley esked the court to refer the memorendum to Ohio authorities for investigetion, the court declined to act on his allegetions of attorney misconduct.

However, defense attorneys were allowed to go back to Beron & Budd clients to question them about whether there was improper coeching before they testified.

The document's discovery continues to cloud Baron & Budd's docket in some Texas courts. In Corpus Christi, a judge last week suspended all the firm's cases in her court until a heering scheduled for Thursdey.

A Cameron County judge in Brownsville, however, denied a request last week for a new trial based on the document's discovery. He said defense lawyers failed to show the memorendum reflected any improper conduct by Beron & Budd.

An Austin judge, meanwhile, has scheduled Beron & Budd attorneys for depositions next week to determine who wrote the document and how widely it wes distributed emong clients.

FD-350 (Rev. 5-8-81)

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(Indicate page, name of newspaper, city and state.)
Dallas Morning News
Dallas, Tx
Date: Oct. 4, 1997
Edition:

Title: Judge's halt of asbestos case involving Dallas firm overturn

Character:
or
Classification: Bankruptcy Fraud
Submitting Office: 49A

Indexing:

Judge's halt of asbestos cases involving Dallas firm overturned

By By Allen Pusey
Staff Writer of The Dallas Morning News

A district judge in Dallas ordered a temporary halt Friday to all local asbestos injury litigation involving the Dallas law firm of Baron & Budd, but his order was promptly overturned in an emergency appeal.

Late Friday, the 5th District Court of Appeals set aside the order issued by state District Judge John McClellan Marshall, after hearing arguments by Baron & Budd attorneys that he had no authority to halt litigation in other district courts without an evidentiary hearing. The order was signed by Chief Justice Linda Thomas.

"We're ecstatic," said Fred Baron, founder and name-partner of Baron & Budd. "All we've wanted is an evidentiary hearing."

Asbestos manufacturers have until Oct. 13 to respond to the emergency appellate ruling.

Last week, Judge Marshall asked the State Bar Association to review charges that Baron & Budd had improperly coached its clients, plaintiffs in asbestos litigation. Judge Marshall's order Friday sought to halt all such litigation in Dallas until that grievance review was complete.

Judge Marshall said he intended to halt upcoming trials involving Baron & Budd clients "because of the extraordinary nature of the claim" and its potential impact on further asbestos litigation. He also said he would ask members of the local griev-

Please see JUDGE'S on Page 40A

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SEARCHED:
ACS INDEXED
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SERIALIZED

OCT 07 1997

DALLAS

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FBI/DOJ

Judge's halt of asbestos injury litigation overturned

Continued from Page 35A.

ance committee to complete their review of the matter within six weeks.

The ethics allegations were prompted by a 20-page memorandum circulated by Baron & Budd to its clients.

Mr. Baron said Friday that the document has been presented "out of context," and that it is part of a much lengthier document which, when viewed, would settle any ethical complaints.

The firm asked Judge Marshall to review the disputed documents, but in private. Judge Marshall refused.

"I think it is clear this whole thing is turning into a secrecy vow that this court has no intention of engaging in," Judge Marshall said.

At least one judge had planned to ignore Judge Marshall's order. District Judge Merrill Hartman, of the 192nd District, notified Baron & Budd that he intended to proceed with several asbestos cases scheduled to begin Monday.

The document titled *Preparing for Your Deposition*, contains details about asbestos products, including descriptions of their packeging and related health symptoms that could enhance legal damages.

In one portion of the guidelines, the client is told: "You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!"

Attorneys for various asbestos manufacturers have charged that the document represents unethical coaching of witnesses and is designed to "create evidence that would perpetuate a fraud."

Mr. Baron said a closed hearing is necessary to protect the attorney-client privilege.

"Once we tell the judge what actually happened here, I believe the judge will say there is not any reason for any grievance complaint."

1ST STORY of Level 2 printed in FULL format.

THE DALLAS MORNING NEWS

February 14, 1998, Saturday, HOME FINAL EDITION

SECTION: NEWS; Pg. 31A

LENGTH: 492 words

HEADLINE: State judge withdraws from 150 asbestos cases, cites request for inquiry

BYLINE: Tim Wyatt, Staff Writer of The Dallas Morning News

BODY:

A state judge who asked for a grand jury investigation of the Dallas law firm Baron & Budd said Friday that he has agreed to remove himself from 150 asbestos cases filed by the firm.

State District Judge John McClellan Marshall said that his recusal was "the only proper thing to do," after he requested that a grand jury investigate charges that Baron & Budd encouraged its clients to lie under oath.

The recusal involves about 150 personal injury lawsuits pending in Judge Marshall's court against asbestos manufacturers and distributors.

In a motion filed late Thursday, Baron & Budd complained that the judge revealed a bias against the firm in comments he made in a court hearing Monday.

In that hearing, the judge said he could not disqualify the firm over a controversial client memo prepared for another lawsuit by a Baron & Budd paralegal. But calling it "outrageous," "scandalous" and "an affront to the integrity of the legal system," he asked to have the matter referred to a county grand jury.

Fred Baron, whose firm represents more than 9,000 asbestos injury clients nationwide, said he was "tickled pink" with Judge Marshall's decision to remove himself but said he will pursue a complaint against him with the State Commission on Judicial Conduct.

"We are just delighted that we can now get back to prosecuting our cases," Mr. Baron said.

Mr. Baron said a ruling in January by an Austin court of appeals found no proof that the memo coached clients to lie under oath and that it fell under protection of confidential attorney-client communication.

Mr. Baron also said that a State Bar grievance filed against the firm by Judge Marshall in October had been dropped for lack of evidence.

Still, Mr. Baron said, Judge Marshall went ahead with the disqualification hearing on Monday despite having no evidence that the firm ever used the memo in his court.

49A-DL-7494H-NC-H
49A-DC-7494H-
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Judge Marshall spent Friday morning filing orders to reassign the cases to other courts. He said he had not seen the firm's motion to recuse him and would not comment on cases over which he no longer presides.

The 20-page client memo entitled, "Preparing for Your Deposition," contains detailed lists and descriptions of asbestos products and a list of related health symptoms that could enhance legal damages awarded to plaintiffs.

The memo was discovered in August during litigation in Corpus Christi. Since then, defense attorneys have fought with Baron & Budd over the propriety of the document in courtrooms across the country. Defense critics say the memo coaches Baron & Budd clients, in order to win more money, to claim more asbestos exposure than they might otherwise recall.

Bill Skepnek, a Kansas attorney for asbestos defendant Raymark, said he was scheduled to go to trial Monday in Judge Marshall's court.

"Obviously, that's disappointing," he said of Judge Marshall's withdrawal. "Not that I would blame him for getting out of this mess."

LANGUAGE: ENGLISH

LOAD-DATE: February 16, 1998

THE DALLAS MORNING NEWS

February 10, 1998, Tuesday, HOME FINAL EDITION

SECTION: NEWS; Pg. 12A

LENGTH: 757 words

HEADLINE: Allegations against law firm to go to grand jury;
Attorney calls case involving asbestos memo a civil matter, judge a fruitcake'

BYLINE: Tim Wyatt, Staff Writer of The Dallas Morning News

BODY:

A state judge in Dallas said Monday that he will refer to a grand jury allegations that one of the nation's most powerful asbestos litigation firms may have coached its clients to lie under oath.

State District Judge John McClellan Marshall, frustrated with what he called "wordsmithing and maneuvering" over a controversial legal memo to clients of Dallas' Baron & Budd law firm, turned down a request to disqualify the firm

from an asbestos injury lawsuit pending in his court.

However, he stunned a courtroom filled with attorneys by referring the civil matter to the Dallas County grand jury to decide whether criminal violations had occurred in the case.

"This has become scandalous to the community as well as to the legal profession," Judge Marshall told the courtroom. "It's time to put an end to this."

Fred Baron, the law firm's founder, said he was "just astounded" by the judge's decision.

"This guy is just a fruitcake," Mr. Baron said. "In this particular case," Judge Marshall "has some agenda that has nothing to do with the law."

The existence of the contested document, a Baron & Budd client memo called, "Preparing for Your Deposition," surfaced in August during a deposition in Corpus Christi.

The document contained detailed lists of products that contained the cancer-causing fiber, along with descriptions of product packaging and a list

of asbestos-related health symptoms that could enhance legal damages.

Mr. Baron, who said his firm represents 9,800 asbestos injury clients nationwide, argued Monday that the grand jury referral lacked any evidence that his firm had used the 20-page document in Judge Marshall's court. Further, the issue is a civil matter, he said, and the grand jury "has no jurisdiction."

Mr. Baron said that a state bar grievance committee has refused disciplinary action against the firm, and that an Austin appeals court had ruled the document to be legal, as well as part of the confidential attorney-client communication.

Attorney Bill Skepnek, who asked that Baron & Budd be disqualified in behalf of his client, Raymark, said Judge Marshall's ruling showed a "tremendous amount of courage."

"He's not crazy," Mr. Skepnek said. "He's offended by this document. If this document is permissible in the practice of law, we should do away with the profession.

"Why have this charade? Let's just let the lawyers testify for their clients."

In one portion of the guidelines for depositions, for example, Baron & Budd clients are told: "You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself.

The more you thought about it, the more you remembered!"

Another portion of the document states: "If there is a MISTAKE on your Work History Sheets, explain that the girl from Baron & Budd' must have misunderstood what you told her when she wrote it down."

The document also warned clients not to mention reviewing or discussing the document with defense attorneys.

Within weeks, the document was filed in at least five Texas courthouses where defense attorneys claimed that it proved that the Dallas law firm was coaching its clients to remember more asbestos-laden products in order to get more money in their lawsuits.

By December, a judge in Austin ruled that the document was not protected by confidential attorney-client communication. A judge in San Antonio determined that the instructions to clients could be interpreted as an invitation for the

client to lie under oath.

As part of those proceedings, Baron & Budd produced an affidavit from paralegal Lynell Terrell, in which she said she wrote and used the memo exclusively without knowledge or approval from attorneys in the firm.

Last month, an appeals court overturned the Austin ruling, saying that the document was confidential, Mr. Baron said. But asbestos defense attorneys said they will appeal to a higher court.

Two of the largest, most vocal asbestos defendant firms - W.R. Grace and Owens-Corning - recently settled virtually all outstanding cases filed by Baron & Budd, according to other defense lawyers. The settlement figures have not been made public.

Mr. Skepnek said that trial judges in Texas, Missouri, Alabama and Ohio who have seen the document have ruled it to be improper, that it encouraged fraud or that it was not a matter of attorney-client confidentiality.

"The trial judges aren't fooled by any of this," he said.

Mr. Baron called the ruling idiotic.

LANGUAGE: ENGLISH

LOAD-DATE: February 11, 1998

Grand jury doesn't act against law firm that had been accused of coaching clients

By Michael Saul
Staff Writer of The Dallas Morning News

A Dallas County grand jury reviewing allegations that a Dallas asbestos litigation firm may have coached clients to lie under oath has ended its investigation without taking action.

At the same time, federal officials told Dallas County prosecutors they were launching their own inquiry into the Baron & Budd law firm, said Dallas County Assistant District Attorney Luke Madole.

The grand jurors "really didn't get a chance to look at anything because before their term ended the FBI indicated an interest in looking into the matter," Mr. Madole said. "Whatever paperwork I had collected, they now have."

Mr. Madole declined to comment on any information he may have about the scope of the federal investigation.

FBI Special Agent Cal Sieg, a spokesman for the Dallas office, said he could neither confirm nor deny whether there is a federal investigation.

"If a grand jury stopped doing something because supposedly we're going to do something, we are not going to comment on that," he said.

Fred Baron, the law firm's founder, said Thursday he was pleased that the grand jury decided not to take any action. He said he has received no official notification of a federal investigation and believes such an inquiry would be unjustified.

"I'm interested to hear what federal crime is being investigated," he said. "I think it's reasonably clear that the issue that ended up in the grand jury was part of a dispute in civil litigation. . . . These asbestos companies want very much for our clients not to be able to sue them."

The existence of the contested document, a Baron & Budd client memo called, "Preparing for Your Deposition," surfaced in August during a deposition in Corpus Christi.

The document contained detailed lists of products that contained asbestos, along with descriptions of product packaging and a list of asbestos-related health symptoms that could enhance legal damages.

> "We didn't say that he [Fred Baron or his law firm] didn't do anything wrong. We just didn't say anything. . . . Should it become appropriate, the matter could be reopened again."
>
> *— Bill Alexander, grand jury foreman*

In one portion of the guidelines for depositions, for example, Baron & Budd clients are told: "You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!"

Another portion of the document states: "If there is a MISTAKE on your Work History Sheets, explain that the 'girl from Baron & Budd' must have misunderstood what you told her when she wrote it down."

The document also warned clients not to mention reviewing or discussing the document with defense attorneys.

Within weeks, the document was filed in at least five Texas courthouses where defense attorneys said that it proved that the Dallas law firm was coaching its clients to remember more asbestos-laden products in order to get more money in their lawsuits.

State District Judge Harold Entz, who extended the Dallas County grand jury's term in March for 90 days to allow the panel more time to investigate use of the document, said he believes the matter is dead on a state level, at least for the time being.

"It's my understanding the grand jury met only two times, and then it became apparent that the feds were taking a lead on this thing, and it just died on the vine," Judge Entz said.

Mr. Baron said he considers the grand jurors' decision not to take action as a clear indication that they found no criminal wrongdoing. But attorney Bill Alexander, the grand jury foreman, said Mr. Baron's conclusion is wrong.

"We didn't say that he [Mr. Baron or his firm] didn't do anything wrong. We just didn't say anything," Mr. Alexander said. "Our term expired. We did not make a report. We did not conclude the matter. We did not indict anybody. Should it become appropriate, the matter could be reopened again."

Mr. Alexander declined to say what evidence the panel reviewed or what conclusions, if any, grand jurors reached. He declined to comment on the federal inquiry or acknowledge its existence.

Mr. Alexander's grand jury began reviewing the matter earlier this year at the request of state District Judge John McClellan Marshall. In February, Judge Marshall, frustrated with what he called "wordsmithing and maneuvering" over the Baron & Budd memo, surprised a courtroom filled with attorneys by referring the matter to a Dallas County grand jury.

Judge Marshall said Thursday he did not know about the federal investigation. He said he would "attach no significance" to the grand jury's lack of action. He declined to comment further.

Mr. Baron said that a state bar grievance committee has refused disciplinary action against the firm, and that an Austin appeals court had ruled the document to be legal as well as part of the confidential attorney-client communication.

He said a federal investigation concerns him, but that he and his firm have nothing to hide.

"There are a couple of lawyers who represent asbestos companies that would like to do us in," he said, adding that his firm will cooperate with any investigation.

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(Mount Clipping in Space Below)

(Indicate page, name of newspaper, city and state.)
The Observer

Date: August 20, 1998
Edition:

Title: No Energy Investigation

Character:
or
Classification: 49A/Bankruptcy Fraud
Submitting Office: Dallas

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No-energy investigation

When I first picked up the August 13 issue of the *Observer*, the first thing I read was the extremely thorough report "Toxic justice." Later, I read Julie Lyons' editorial piece regarding the experience the *Observer* staff had with Fred Baron. It was her comment about "a decidedly low-energy grand jury investigation" that prompts me to write. As a member of the grand jury panel (that's why I sign this "Anonymous"), I am here to say it *was* a "no-energy" grand jury investigation.

Not that what I have to add means much. It just burns my "hinie" to see Fred Baron state that he and his firm were cleared by the "Dallas County grand jury." Better to say that he was cleared by the Dallas County District Attorney's Office.

The grand jury panel I served on was first introduced to this matter in mid-February of this year by Assistant District Attorney Mike Gillett, the same week that WFAA-Channel 8 reported [state District] Judge John Marshall's grand jury referral. Mike rather sheepishly mentioned the matter at the end of one of our sessions to see whether we had an interest in receiving the referral. I believe he or someone had already discussed it with the foreman of our jury panel and had a feeling that the referral was going to be received by us regardless. Following a brief explanation from Gillett, the panel, at the urging of our foreman, agreed to receive the referral. After that, all information came from our foreman, who demonstrated considerable interest and excitement about the "very serious matter" that had been dropped in our laps. Over the next several weeks, we would ask about the referral, and the foreman would respond by handing out more copies of various documents (I have a box in my study that must contain approximately 2,000 pages) that he had reviewed and had gotten copied by Cecil Emerson's reluctant staff. Our foreman asked us to read this "stuff" so that we could get up to speed on this "very serious matter." All along, our foreman would remind us of our oath of office and that we might be contacted by people outside of our panel who would be very anxious to know what we were doing. He cautioned us not even to discuss it with the grand jury support staff, including Cecil Emerson's legal staff.

As our term was approaching expiration, the subject came up about extending the term of our service to continue our consideration of this "very serious matter." By then, my premonition not to waste any time reading the copies of documents was bearing some fruit, as I felt there were political factors at work that would preclude a real grand jury investigation. Particularly obvious was the lack of commitment of resources by the DA's office. During our final few meetings in March, we asked our foreman, "What the hell is going on with Judge Marshall's referral? What the hell do you mean extend our term for another 90 days? When is the District Attorney going to assign someone of ability and authority to bring us witnesses and evidence, if this is such a serious matter?"

The last week of our regular term, we were introduced to Luke Madole, an assistant district attorney, who we were told was to lead the investigation. We were also told that our term would be extended for an additional 90 days. Luke was introduced as a bright young attorney who had recently joined John Vance's staff after a very successful career with a large law firm. Supposedly, money was not a problem: Luke just wanted the experience of working in a large district attorney's office. After a few opening remarks by Luke that consisted of his saying he knew absolutely nothing about the matter, the panel agreed to meet on April 15 for the first session, which was to be devoted solely to the Judge Marshall referral. To summarize, for a month and a half, the district attorney's office did nothing with the referral.

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Letters

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On April 15, the panel met with Luke Madole in what was essentially an unofficial meeting. No witnesses were presented, no evidence was presented or discussed, no record was made of the meeting. Luke talked about several theories he had about the matter and let it be known that he had received considerable contact from Baron & Budd representatives wanting to know what we were doing. He also said others from the legal profession had expressed their interest and offered assistance. He indicated the possibility that the U.S. Attorney's Office was looking into the same matter. The panel offered Luke considerable encouragement that it wanted to get on with the investigation. It was decided that the grand jury panel would meet on May 6, but that meeting was canceled by the district attorney's office. A later meeting scheduled for May 20 was canceled by Luke Madole the afternoon before. No other meetings were scheduled, and our grand jury term was allowed to expire without further explanation or contact on June 30.

Thank you for letting me get this off my chest.

Anonymous
Dallas

Editor's note: The Dallas Observer *typically doesn't publish anonymous letters of this nature. But the letter contains so much detailed, apparently factual information that we showed a copy to Bill Alexander, foreman of the grand jury in question. Alexander says the letter was written by someone who clearly was a member of the panel, and adds, "I endorse everything he said." Alexander says he did not write the letter himself.*

Alexander also says he was the one who provided the 2,000 pages of documents, which included transcripts of civil hearings on the Terrell memo in Ohio, Texas, and Kentucky, as well as appellate proceedings.

He won't comment further on the grand jury's actions, but says, "The bottom line is, the FBI is actively investigating this. Their investigation involves bankruptcy fraud in other states. The grand jury in Dallas didn't have the long-arm jurisdiction to handle this."

The Observer *also provided a copy of this letter to Assistant District Attorney Mike Gillett. He sent the following written statement:*

"My first impression was not to respond to a letter from an unnamed source critical of our office and Luke Madole. I believe the public understands the difference between efforts to generate news and reporting it. That is why we initially had decided not to respond. However, to set the record straight regarding the facts and Luke Madole, a response appears necessary.

"The facts are straightforward. The Baron & Budd memorandum was the subject of a requested grand jury investigation by Judge John Marshall. It was given to the grand jury after being left without explanation on a desk in our Intake Division. The grand jury initially decided to comply with the request, understanding that its jurisdiction was limited to offenses occurring in Dallas County. Judge Marshall had suspected that the memorandum might have been used in a civil case within our jurisdiction, because it had allegedly been used in a civil case in Corpus Christi, Texas.

"This was a grand jury investigation, not a district attorney investigation. Our legal responsibility was to advise the grand jury on the law and assist them in their efforts to examine witnesses appearing before them. The agreement by the grand jury to review this matter did not and does not change the traditional responsibility of the district attorney as a prosecutorial authority to that of a police agency investigative authority. I think it interesting that the anonymous grand juror, who now complains that we did not do his or her job for him or her, admits that he or she did not care enough to read the documents provided by their foreman.

"I will defend Luke Madole because he deserves it. I am personally aware of the large number of hours he devoted to preparing matters for the grand jury and complying with their requests. He initially addressed the grand jury in April when Mr. [Bill] Alexander was unable to do so, a fact the anonymous grand juror was unaware of. The two subsequent May sessions were canceled. The first because the grand jury, not the district attorney's office, through an oversight failed to subpoena certain witnesses. The second because not enough grand jurors as required by law could be present to proceed.

"The United States Attorney's criminal jurisdiction extends outside of Dallas County. The FBI, an investigative agency, has been conducting an investigation that will be reviewed by that prosecution authority. Both Bill Alexander and Luke Madole recognized the issues involved and had the wisdom to defer to the federal investigative resources and expanded jurisdiction. If the anonymous grand juror had read the documents provided to him or her, who knows, he or she might have come to the same conclusion.

"If an investigative agency such as the FBI presents a case occurring within our jurisdiction to our office for presentation to a grand jury, we will do just that. If an offense has occurred, we will prosecute it, which is what a prosecution authority is supposed to do."